Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1994

John M. O'Quinn, *Petitioner*,

v.

Donna C. Kline, *Respondent.*

Petition for Writ of Certiorari to the
Court of Appeals of Texas, Houston [14th District]

PETITION FOR WRIT OF CERTIORARI

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April 10, 1995

QUESTIONS PRESENTED

1. Whether an arbitration award of punitive damages against Mr. O'Quinn in this case is unconstitutional in violation of the Due Process Clause of the Fourteenth Amendment.

2. Whether an arbitration award of punitive damages is generally unconstitutional in violation of the Due Process Clause of the Fourteenth Amendment, even if the parties expressly attempted to bestow that right upon the arbitrators.

3. Whether an express contractual waiver of the constitutional right to due process is required to allow an arbitrator to award punitive damages without violating the Due Process Clause of the Fourteenth Amendment.

4. Whether an arbitrators' decision to award punitive damages in a case in which the parties did not specifically agree that the punitive damages may be awarded in the arbitration proceeding and the complainant did not request punitive damages, is entitled to a deferential standard of review.

LIST OF ALL PARTIES

1. John M. O'Quinn, Petitioner herein, was a Defendant in the Trial Court, a Defendant in the Arbitration Proceeding, and an Appellee in the Fourteenth Court of Appeals.

2. Donna C. Kline, Respondent herein, was the Plaintiff in the Trial Court, the Plaintiff in the Arbitration Proceeding, and the Appellant in the Fourteenth Court of Appeals.

3. Thomas J. Pearson was a Defendant in the Trial Court and a Defendant in the Arbitration Proceeding. There was no appeal taken by Mr. Pearson to the Fourteenth Court of Appeals and Ms. Kline did not appeal as to Mr. Pearson. It is believed that the litigation between Ms. Kline and Mr. Pearson is now final and that Mr. Pearson is not involved in this proceeding.

4. Bank One, Texas, N.A. ("Bank One"), was a Defendant in the Trial Court, but not a party to the Arbitration Proceeding. Ms. Kline appealed to the Fourteenth Court of Appeals with respect to the Trial Court's Judgment as to Bank One. Bank One prevailed. It is believed that the litigation between Ms. Kline and Bank One is now final and that Bank One is not involved in this proceeding.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

John M. O'Quinn, *Petitioner*,

v.

Donna C. Kline, *Respondent.*

Petition for Writ of Certiorari to the
Court of Appeals of Texas, Houston [14th District]

Petitioner John M. O'Quinn respectfully petitions for a Writ of Certiorari to review the decision of the Fourteenth Court of Appeals of Texas, Houston.

OPINIONS BELOW

The *Arbitrators' Award* is not reported; however, a copy of the *Arbitrators' Award* is included as Appendix G and a copy of the Arbitrators' *Denial of Petitioner's Motion to Partially Modify and Vacate Arbitration Award* is included as Appendix H. The Trial Court reviewed the *Award* and entered *Final Judgment* vacating the portion of the arbitrators' *Award* that purported to impose punitive damages on Mr. O'Quinn. The Trial Court's *Final Judgment* is not reported; however, a copy is included as Appendix F. A three-judge panel of the Fourteenth Court of Appeals of Texas, with one dissent, affirmed in part and reversed and rendered in part. This decision of

the Court of Appeals is reported at 874 S.W.2d 776. The *Majority Opinion* for such decision is included as Appendix A; the *Dissenting Opinion* is included as Appendix B; and the *Opinion* of the Fourteenth Court of Appeals responsive to the parties' *Motions for Rehearing*, which *Opinion* supplemented the original opinions and modified the original decision but otherwise denied rehearing, is included as Appendix C. The Texas Supreme Court declined to review the decision of the Fourteenth Court of Appeals. The Texas Supreme Court's denial of Petitioner's *Application for Writ of Error* is reported at 38 Tex. Sup. Ct. J. 100 (December 1, 1994) and a copy is included as Appendix D. The Texas Supreme Court's overruling of Petitioner's *Motion for Rehearing* is reported at 38 Tex. Sup. Ct. J. 159 (January 12, 1995) and a copy is included as Appendix E.

JURISDICTION OF THIS COURT

The Texas Court of Appeals issued its opinion in this case on March 24, 1994, and ruled on the parties' *Motions for Rehearing* on May 12, 1994. The Texas Supreme Court denied Mr. O'Quinn's *Application for a Writ of Error* on December 1, 1994, and denied Mr. O'Quinn's *Motion for Rehearing* on January 12, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES PRESENTED IN THIS CASE

The Fourteenth Amendment to the United States Constitution provides in part: "nor shall any State deprive any person of life, liberty, or property, without the due process of law. * * *"

The Federal Arbitration Act, 9 U.S.C. § 10, provides in part, "(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration -- (4) the arbitrators exceeded their powers. . ."

STATEMENT OF THE CASE

This dispute arises out the arbitration of a contract dispute among lawyers over the allocation of contingent fees from various lawsuits or cases. Although Ms. Kline did not seek punitive damages, and there was no notice that punitive damages might be in issue in the Arbitration Proceeding, and Texas law does not allow the award of punitive damages under the facts of this dispute, the Arbitrators attempted to award punitive damages. The Trial Court then correctly entered *Final Judgment* in the amount of the actual damages awarded by the Arbitrators but modified and partially vacated the Award to set aside the punitive damages the Arbitrators had improperly attempted to award. Ms. Kline appealed. The Texas Fourteenth Court of Appeals then modified the Trial Court's *Final Judgment* to award punitive damages against Mr. O'Quinn. The Texas Supreme Court declined to hear the case.

In the mid-80's, Mr. O'Quinn entered into an agreement with an attorney named Don Maierson with respect to certain toxic tort cases. Under their agreement, Mr. O'Quinn was to receive 45% of any fees recovered in the cases, with Mr. Maierson to use the other 55% to pay himself and the other attorneys working on the cases. On March 1, 1988, Ms. Kline, Mr. O'Quinn, and Mr. Pearson entered into an agreement by which Mr. O'Quinn would

fund and assist in certain toxic tort cases. Later, Ms. Kline, Mr. O'Quinn, and Mr. Pearson entered into a second agreement dated January 20, 1989 detailing their understanding of how the fees from such cases were to be allocated. Each of these agreements specified it would be governed by Texas law. As a result of various settlements in the lawsuits covered by the above agreements, sums were received for the clients and attorney's fees were recovered.

In early 1991, Ms. Kline filed suit against Mr. O'Quinn, Mr. Pearson, and Mbank (now Bank One). claiming that they owed her additional attorney's fees from the settlements of certain of these lawsuits. In her *Plaintiff's Original Petition*, a copy of which is included in Appendix J beginning at J-4. Ms. Kline sued Mr. O'Quinn and Mr. Pearson; Bank One was named in Ms. Kline's lawsuit, but no claim was made against Bank One. Ms. Kline alleged that Mr. O'Quinn and Mr. Pearson were in breach of their contractual obligations regarding the allocation of attorney's fees. Although her lawsuit was to recover monies that she claimed she was owed under the agreements, Ms. Kline also alleged that Mr. O'Quinn and Mr. Pearson breached an alleged tort duty of good faith and fair dealing and had assumed the duties of fiduciaries and had breached a fiduciary duty. Mr. O'Quinn answered and denied all wrongdoing.

The agreements among Ms. Kline, Mr. O'Quinn, and Mr. Pearson provided for arbitration. Therefore, after filing suit, Ms. Kline filed a *Demand For Arbitration* with the American Arbitration Association, a copy of which is included as Appendix I, initiating Arbitration Proceeding No. 70 194 0030 91 W. Ms. Kline's *Demand For Arbitration* described the dispute as a "disagreement

among attorneys over contingent fee recoveries." Ms. Kline also submitted her *Plaintiff's Original Petition* to the AAA, together with an explanatory letter, which noted that the *Plaintiff's Original Petition* "states Ms. Kline's position on the matters and controversy more clearly than the papers previously submitted" to the AAA. Neither Ms. Kline's *Demand For Arbitration* nor her *Plaintiff's Original Petition* made any request for an award of punitive damages. In her Prayer in her *Plaintiff's Original Petition*, Ms. Kline requested only actual damages, attorney's fees, pre-judgment and post-judgment interest, and a declaration of the rights and duties of the parties with respect to each other.

The arbitration hearing was held in May 1992. On June 23, 1992, the arbitrators issued their *Award of Arbitrators.* A copy of the *Award* is included as Appendix G. The Arbitrators awarded Ms. Kline compensatory damages against Mr. O'Quinn, plus pre-Award and post-Award interest. Additionally, even though Ms. Kline had not pled for punitive damages and Mr. O'Quinn had no notice until after the close of the evidence that Ms. Kline might even seek punitive damages in the Proceeding, the Arbitrators decided that Mr. O'Quinn should pay Ms. Kline $50,000 in exemplary damages.

Because the *Arbitrators' Award* improperly purported to assess punitive damages against him, Mr. O'Quinn timely sought review of the *Award* by the Arbitrators themselves pursuant to the Texas General Arbitration Act. The arbitrators denied Mr. O'Quinn's *Motion*. A copy of the arbitrators' denial of such *Motion* is included as Appendix H.

The parties specified in their agreements that Texas law would govern the dispute. As such, it was believed at the time that even though the Federal Arbitration Act may be applicable to this dispute, under ***Volt Information Sciences v. Board of Trustees***, 489 U.S. 468 (1989), the procedural aspects of the Texas General Arbitration Act should be followed. Thus, Ms. Kline filed with the Trial Court a pleading entitled an *Application for Decree* by which she sought to confirm the arbitrators' *Award*. Mr. O'Quinn opposed Ms. Kline's *Application for Decree*; a copy of Mr. O'Quinn's *Opposition to Kline's Application for Decree* is included as Appendix O. In accordance with the provisions of the Texas General Arbitration Act, Mr. O'Quinn also timely filed with the Trial Court his *Motion to Vacate, or, Alternatively, Modify and Correct the Award*, a copy of which is included as Appendix P.

The Trial Court held a series of hearings over the next few months regarding the issues raised by Mr. O'Quinn's *Motion to Vacate, or, Alternatively, Modify and Correct the Award* and by Mr. O'Quinn's opposition to Ms. Kline's *Application for Decree*. From the very first hearing on October 2, 1992, the Trial Court held that she was going to modify the arbitrators' *Award* to vacate the portion in which the arbitrators attempted to impose exemplary damages on Mr. O'Quinn. The Trial Court stated, however, that she would not enter a *Final Judgment* confirming the actual damages awarded by the arbitrators and vacating the exemplary damages until such time as Ms. Kline's claims against Bank One were also resolved. The Trial Judge said there would not be multiple appeals from this complex dispute. Ms. Kline then amended her pleadings to allege claims against Bank One and the Trial Court set the case for trial.

Ms. Klines proceeded to trial against Bank One on December 21, 1992. At the close of Ms. Kline's case in chief on September 28, 1992, Bank One moved for a directed verdict. The Trial Judge granted Bank One's motion.

On January 4, 1993, the Trial Court then entered its *Final Judgment* on January 4, 1993. In her *Final Judgment*, included as Appendix F, the Trial Court held that the arbitrators purported award of punitive damages failed to conform either to the parties' arbitration agreement or to the relief sought by Ms. Kline, and that the arbitrators exceeded the scope of their authority in attempting to award punitive damages against Mr. O'Quinn. *See* Paragraph 1 at F-3. Mr. O'Quinn subsequently paid the Trial Court's *Judgment*.

Ms. Kline appealed from the *Final Judgment* with respect to the Trial Court's vacating of the punitive damages. Ms. Kline also appealed as to the Trial Court's rulings that Mr. O'Quinn was not required to pay post-award attorneys fees and that Ms. Kline was not entitled to a separate trial on the issue of punitive damages. Ms. Kline also appealed as to Bank One.

The Texas Court of Appeals held that the trial court incorrectly modified the *Arbitrator's Award* to vacate the award of punitive damages. The Court of Appeals affirmed the Trial Court's *Final Judgment* that Mr. O'Quinn was not required to pay post-award attorneys fees and that Ms. Kline was not entitled to a separate trial on the issue of punitive damages and as to Bank One. Both Mr. O'Quinn and Ms. Kline asked the Texas Supreme Court to hear the case, but the Texas Supreme Court declined to do so.

Pursuant to Rule 14(h) of this Court's Rules, it is noted that the federal questions sought to be reviewed were presented to the Trial Court in a series of hearings extended from October 2, 1992 through December 18, 1992. Issues were raised through formal pleadings, through letters to the Trial Judge, and through oral arguments. Mr. O'Quinn raised before the Trial Court the issue that the award of exemplary damages by the arbitrators violated his rights afforded by the Due Process Clause of the United States Constitution. Mr. O'Quinn specifically raised the issue of lack of Due Process in his *Opposition to Kline's Application for Decree*, *see* Appendix O, Paragraph 9 at pages O-6 and O-7 and Paragraph 17 at page O-11 and also in his *Motion to Vacate, or, Alternatively, Modify and Correct Arbitration Award*, *see* Appendix P, Paragraphs 10, 11, 12 and 13 at pages P-8 through P-10 and Paragraph 21 at P-15 and P-16.

In the Texas Fourteenth Court of Appeals, Mr. O'Quinn argued that the Due Process Clause of the United States Constitution requires that punitives damages be a sanction reserved to the courts where there are safeguards such as judicial review. The Fourteenth Court of Appeals of Texas acknowledged that Mr. O'Quinn had raised the issue of whether lack of notice violated Due Process, *see* 874 S.W.2d at 784 and Appendix A at A-12, but stated that Mr. O'Quinn waived the other constitutional issue because it was not raised in the Trial Court. However, as discussed below, under Texas law Mr. O'Quinn did not need to raise this other constitutional issue before the Trial Court because the Trial Judge had from the outset held that the arbitrators exceeded their authority because their purported award of punitive damages failed to conform either to the parties' arbitration agreement or to the relief sought by Ms. Kline.

Because of the importance of the issues raised, Mr. O'Quinn requests that this Court grant his *Petition for Writ of Certiorari*.

I. Because arbitration proceedings fail to meet the constitutional requirements applicable to punitive damages, arbitrators generally should not be permitted to award punitive damages

A. This Court's decisions in *Oberg*, *Haslip*, and *TXO* demonstrate the constitutional requirements applicable to awards of punitive damages:

As this Court recently observed, punitive damages are "exceptional" in nature. ***Honda Motor Co. v. Oberg***, 114 S.Ct. 2331, 2340-2341 (1994); *see also* ***Pacific Mut. Life Ins. Co. v. Haslip***, 499 U.S. 1, 18 (1991) (expressing concern that unlimited jury discretion could allow punitive damages to "run wild").

This Court recently emphasized that Due Process requires judicial review of awards of punitive damages. ***Oberg*** at 2334. In ***Oberg***, the Court struck down an Oregon law which prohibited judicial review of the amount of punitive damages awarded by a jury. ***Id.*** at 2339. In reaching this conclusion, the Court emphasized the special nature of punitive damages and the "acute danger of arbitrary deprivation of property" from punitive damages. In addition, the Court emphasized that judicial review of punitive damages was "one of the few procedural safeguards which the common law provided against that danger."

This Court earlier has emphasized the importance of such procedural safeguards in the Court's cases leading to the ***Oberg*** decision. For example, in ***Pacific Mutual Life Ins. Co. v. Haslip***, 499 U.S. 1 (1991), this Court held that the traditional common law method for assessing punitive damages is not so inherently unfair as to deny Due Process and to be *per se* unconstitutional. The Court went on to hold, however, that unlimited jury discretion -- or unlimited judicial discretion for that matter -- in fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities. ***Id.*** at 18. The Court stated that the jury's discretion as to punitive damages is constitutional only when a trial court gives the jury reasonable and adequate guidance in making such awards. The Court noted that under Alabama law, as under the law of most states, punitive damages are imposed for purposes of retribution and deterrence, not to compensate the plaintiff for any injury. The Court observed that the instructions in ***Haslip*** informed the jury that its discretion should be guided by this purpose. ***Id.*** at 19.

Additionally, this Court in ***Haslip*** indicated that punitive damages are constitutional only when the instructions given to the jury describe the standards to be used by the jury in determining whether to impose such awards. Although juries are given significant discretion in assessing punitive damages, that discretion is not unlimited. In ***Haslip***, the Court found that the jury's discretion was confined by appropriate instructions about deterrence and retribution and the state policy concerns sought to be advanced. ***Id.*** at 19-20. The Court found that the jury was instructed that if punitive damages were to be awarded, the jury "must take into consideration the character and degree of the wrong as shown by the

evidence and necessity of preventing similar wrong." *Id.* at 19.

In ***TXO Production Corp. v. Alliance Resources Corp.***, 113 S. Ct. 2711 (1993), this Court again considered the limits imposed by Due Process on awards of punitive damages. The Court concluded that because West Virginia law requires that punitive damages bear a reasonable relationship to compensatory damages, the magnitude of the potential harm that defendant's conduct could have caused, as well as to the possible harm to the other victims that might have resulted if similar future behavior were not deterred, there was sufficient concern by the West Virginia trial courts with the reasonableness of the award such so as to meet the substantive requirements of the Due Process Clause. *Id.* at 2720-721.

Turning to the procedural component of the Due Process Clause, the Court indicated that the inquiry could include whether the punitive damages award is a result of a fundamentally unfair procedure because the jury was not adequately instructed, whether the award was adequately reviewed by the trial or appellate courts, and whether the defendant had no advance notice that the jury might be allowed to return such a large award or to rely on potential harm as a basis for its calculation. The Court declined to address the first argument as it was not argued or passed on below. The Court concluded that in fact the jury's award was adequately reviewed by the trial court and the appellate court and that defendant had notice under prior law that punitive damages could be awarded under the circumstances of the case. Thus, the Court found no procedural violation of Due Process as a result of the procedures used in West Virginia for the awarding of punitive damages. *Id.* at 2720-724.

B. The safeguards emphasized by this Court in *Oberg*, *TXO*, and *Haslip* are completely absent from arbitration proceedings generally:

There is nothing in an arbitration proceeding to ensure against excessive or otherwise inappropriate punitive damage awards. None of the protections -- not a single one -- discussed by the Court in ***Oberg***, ***Haslip*** and ***TXO*** is present in an arbitration proceeding. There is no voir dire of the potential arbitrators to determine their biases against the defendant or their feelings as to the award of punitive damages. Discovery is abbreviated, which can result in the defendant being denied the opportunity to develop the facts necessary to refute the plaintiff's allegations. There are few evidentiary rules applicable to an arbitration proceeding; virtually everything is admissible into evidence. Hence, there is no procedure for controlling and limiting the evidence submitted to the Arbitrators and the statements made by the parties and their advocates to the Arbitrators. Virtually anything can be done or said during an arbitration hearing -- and apparently was in this case.

There is no procedure whereby the arbitrators are provided, either by the trial court or the American Arbitration Association or some other supervising organization, instructions that articulate the purposes of punitive damages. Unlike juries, arbitrators are not instructed that punitive damages are to punish and to deter the defendant, nor are arbitrators instructed as to when and under what circumstances the law allows the award of punitive damages.

Because punitive damages are so subjective, the United States Constitution requires judicial supervision by the trial or appellate courts. However, one of the underlying theories of arbitration is that there should be minimal court review and supervision. Indeed, the Texas Court of Appeals in this case deferred to the arbitrators as to "procedural matters such as the sufficiency of Kline's pleadings" and then presumed "adequate evidence to support the award." *See* 874 S.W.2d at 783 and Appendix A at A-11. Because there is rarely a record of the arbitration proceedings, arbitrators sometimes choose not to state their reasoning or the bases for their decision, making it is almost impossible for reviewing courts to supervise the proceedings or the arbitrators' award. While this may seem acceptable for compensatory damages, allowing arbitrators to award *punitive* damages will lead to unpredictable, uncontrollable, nonreviewable awards of punitive damages.

There is no procedure applicable to arbitration awards for the trial court or the appellate courts to review the testimony and documents considered by the arbitrators or the basis on which the arbitrators made their award of punitive damages. Similarly, there is no procedure for the trial court or the appellate court to determine whether the award of punitive damages by the arbitrators is excessive taking into account the factors articulated by this Court in the ***Oberg***, ***Haslip***, and ***TXO*** decision.

Even before this Court's decision in ***Oberg***, there were some who questioned whether arbitrators could award punitive damages without violating due process. One judge summarized the situation as follows:

> Finally, ***Haslip*** is about due process and the protections that must be employed for punitive damages to be permissible in any event. In the arbitration setting we have almost none of the protections that fundamental fairness and due process require for the imposition of this form of punishment. Discovery is abbreviated if available at all. The rules of evidence are employed, if at all, in a very relaxed manner. The factfinders (here the panel) operate with almost none of the controls and safeguards assumed in ***Haslip***. The proceeding at issue in ***Haslip*** was conducted in the Alabama state court system with full appellate review. Here, as noted by the opinion of the court, the scope of review of the arbitrator's award is narrowly limited if not almost nonexistent.
>
> This standard of review, of course, almost completely ignores the review required by ***Haslip***. Why should less be required in an arbitration proceeding if, indeed, punitive damages are within the scope of AAA Rule 43? The simple answer is that the rules doe not contemplate an award of punitive damages. The district court was correct and should be affirmed.

Lee v. Chica, 983 F.2d 883, 889 (8th Cir. 1993) (Beam, J., concurring in part and dissenting in part); *see also* Ira P. Rothken, *Punitive Damages in Commercial Arbitration: A Due Process Analysis*, 21 GOLDEN GATE UNIV. L. REV. 387, 397-404 (1991) (concluding that arbitration awards of punitive damages violate due process).

C. This Court's decision in *Mastrobuono* highlights the importance of the issues presented:

Earlier this Term, this Court upheld an arbitrators' award of punitive damages under the Federal Arbitration Act. In ***Mastrobuono v. Shearson Lehman Hutton***, 115 S.Ct. 1212 (1995), this Court upheld the award of punitive damages under the Federal Arbitration Act even though the parties' contract contained a choice-of-law provision specifying the application of New York law, which prohibits arbitrators from awarding punitive damages. In ***Mastrobuono***, the Court indicated that if the parties' intent is clear as to whether the arbitrators may award punitive damages, the intention of the parties will be upheld, even if a rule of State law would otherwise exclude such claims from arbitration. ***Id.*** at 4197. *See also* ***Southland Corp. v. Keating***, 465 U.S. 1 (1984), and ***Perry v. Thomas***, 482 U.S. 483 (1987). The Court indicated that if the arbitration provision in issue unequivocally excludes punitive damage claims, such claims are to be excluded from the arbitration process. *See also* ***Mitsubishi v. Soler Chrysler-Plymouth***, 473 U.S. 628 (1985). However, to the best of Petitioner's knowledge, the Due Process issues presented in this case were not raised before this Court in ***Mastrobuono*** or any other prior decision of this Court involving an award by arbitrators of punitive damages.

Clearly, an arbitration proceeding performs a function that is and has been a traditionally exclusive function or prerogative of government. This is particularly so when arbitrators award punitive damages. In ***Edmonson v. Leesville Concrete Co.***, 500 U.S. 614, 625 (1991), this Court, citing ***Haslip***, observed that "the jury can weigh the gravity of a wrong and determine the degree of the government's interest in punishing and determining wilful misconduct."

Edmonson at 625. If Due Process requires judicial review of awards of punitive damages by juries and courts, as this Court held in ***Oberg***, surely Due Process applies to the arbitration process and requires judicial review of awards of arbitrators.

The tension between ***Oberg***, which requires judicial review of jury awards of punitive damages, and ***Mastrobuono***, which suggests deference to an arbitrators' award of punitive damages, will continue. Given the absence of the traditional common law procedures in an arbitration proceeding, together with the widespread use of arbitration, the issues raised in this Petition for Certiorari are likely to come before the courts over and over. This Court, through a decision in this case, can firmly establish an appropriate rule applicable to such cases.

II. Contracting parties do not waive their Due Process rights simply by agreeing to arbitrate unless they expressly agree to allow arbitrators to award punitive damages:

Arbitration is entirely consensual. Unless there is a *contract* containing an arbitration provision, there is no arbitration. *Contracting* parties elect to submit their future disputes to arbitration for the purpose of a private, speedy and fair resolution, without the delays and rigidities of a court trial. They expect their arbitrators to award the type of relief that the law allows for breach of *contract*. They do not expect the arbitrators to award punitive damages, particularly when the law does not allow the recovery of punitive damages for *breach of contract*. *E.g.*, ***International Union of Operating Engineers,***

Local No. 450 v. Mid-Valley, Inc., 347 F. Supp. 1104, 1109 (S.D. Tex. 1972).

It is one thing for *contracting* parties to submit to arbitration the issue of *contractual* **compensatory** damages, which are largely based on objective criteria. But **punitive** damages are entirely different. Punitive damages are quasi-criminal and subjective in nature. As stated by the Court in ***Oberg***, the jury discretion that is the hallmark of the common law punitive damage system **must** be complemented by procedural safeguards that will ensure against excessive or otherwise inappropriate awards. When parties submit their *contractual* disputes to arbitration, they should not risk having punitive damages awarded against them without any safeguards to ensure against excessive or inappropriate punitive damage awards.

Parties do not "waive" their fundamental substantive and procedural rights simply by agreeing that their future *contract* disputes will be resolved by arbitration. As one federal court in Texas explained:

> Contracting parties do not normally agree to assess exemplary damages for a breach of contract. Such damages being punitive in nature are rare in contract law. Contractual consent to so drastic a "remedy" for simple breach cannot be implied. **Therefore, a arbitrator's assessment of punitive damages must be grounded in express language.** In this case, neither the contract clause nor the simple question submitted suggest authority for exemplary damages.

Mid-Valley, 347 F. Supp. at 1109 (emphasis added). Under this approach, arbitrators may award punitive

damages only if expressly allowed by the parties' agreement. The view adopted in ***Mid-Valley*** is entirely consistent with the few Texas cases on point. In ***Grissom v. Greener & Sumner Constr. Co.***, 676 S.W.2d 709 (Tex. App. -- El Paso 1984, writ ref'd n.r.e.), for example, the parties expressly agreed to submit contract and tort claims, and all pending claims for damages, including punitive damages, to arbitration.

In addition to the above, there are additional reasons for requiring the parties' "express consent" to allow arbitrators to award punitive damages. For one thing, the exceptional and quasi-criminal nature of punitive damages weighs heavily in determining whether there has been a waiver of Due Process rights. In connection with a contractual waiver of Due Process rights (which protect against criminal penalties), the U.S. Constitution requires that the waiver be voluntarily, intelligently, and knowingly made. *See* ***Fuentes v. Shevin***, 407 U.S. 67, 94-95 (1972); ***D.H. Overmeyer Co. v. Frick Co.***, 405 U.S. 174, 185 (1972). Moreover, this Court has previously stated that it will "not presume acquiescence in the loss of fundamental rights." ***Ohio Bell Tel. Co. v. Public Utilities Comm'n***, 301 U.S. 292, 307 (1937). Instead, courts "indulge every reasonable presumption against waiver." ***Aetna Ins. Co. v. Kennedy***, 301 U.S. 389, 393 (1937).

Given the close connection between criminal law and punitive damages, the waiver standard applicable to other constitutional safeguards against criminal penalties should control the determination of whether a contracting party has waived his or her constitutional safeguards against an excessive award of punitive damages. As indicated in ***Oberg***, the special nature of punitive damages suggests

that a waiver of the Due Process safeguards against excessive punitive damages cannot be lightly inferred.

Although some courts flatly refuse to allow arbitrators to award punitive damages, *e.g.*, ***Garrity v. Lyle Stuart, Inc.***, 353 N.E.2d 793 (N.Y. 1976), other courts allow arbitrators to award punitive damages when the parties expressly agree that they may do so. In other words, these latter courts impose an "express consent" requirement before arbitrators may award punitive damages. *E.g.*, ***Edward Elec. Co. v. Automation, Inc.***, 593 N.E.2d 833, 842-43 (Ill. App. 1st Dist. 1992) (vacating severable award of punitive damages); ***Complete Interiors, Inc. v. Behan***, 558 So.2d 48, 50-51 (Fla. App. 5th Dist. 1990). In addition, numerous federal courts have considered this issue in the context of collective bargaining agreements and have concluded that arbitrators cannot award punitive damages absent an express agreement to that effect. *E.g.*, ***Howard P. Foley Co. v. International Brotherhood of Electrical Workers***, 789 F.2d 1421, 1424 (9th Cir. 1986); ***Baltimore Regional Joint Bd. v. Webster Clothes, Inc.***, 596 F.2d 95, 98 (4th Cir. 1979); ***Refinery Employees Union v. Continental Oil Co.***, 268 F.2d 447 (5th Cir. 1959); ***Westmoreland Coal Co. v. United Mine Workers***, 550 F. Supp. 1044, 1047-48 (W.D. Va. 1982); ***Mid-Valley***, *supra*, 347 F. Supp. at 1109-10.

Applying an express consent rule in this case requires a reversal of the Fourteenth Court of Appeal's decision below and affirmation of the Trial Court's *Final Judgment*. As set forth in the Court of Appeal's opinion, the arbitration clause failed to expressly allow arbitration of punitive damages, let alone any express reference to tort claims. Under the express consent rule, the award of punitive damages exceeded the arbitrators' authority and was correctly set aside by the trial court. *See* TEX. REV. CIV.

STAT. ANN. art. 237 & 238 (Vernon 1973) (requiring the court to vacate or modify an arbitration award where the arbitrators exceed their authority or have awarded on a matter not submitted).

A rule disallowing punitive damages in arbitration unless the parties have expressly agreed otherwise is consistent with the constitutional limitations of ***Oberg***, ***TXO***, and ***Haslip***, yet is also consistent with ***Mastrobuono*** and the express consent cases cited above. It is unrealistic to assume that when parties agree to arbitrate future disputes arising out of their contract they thereby intend to "waive" all of the various constitutional protections afforded by the law in the absence of any express wording to that effect.

III. The arbitration proceedings at issue in this case were even worse than usual in terms of the absence of Due Process safeguards against punitive damages and violated Mr. O'Quinn's Due Process rights:

Due Process of law must apply in arbitration proceedings just as in other legal proceedings. In this case, Ms. Kline's pleadings and submission to the arbitrators gave O'Quinn absolutely no notice of any claim for punitive damages. Ms. Kline's counsel submitted the *Plaintiff's Original Petition* to the AAA as the definition of Ms. Kline's claim. In her *Plaintiff's Original Petition*, Ms. Kline alleged breach of contract, breach of an alleged tort duty of good faith, and breach of an alleged fiduciary duty. Ms. Kline pled and prayed only for actual damages, *i.e.*, economic losses. Ms. Kline did not plead or pray for exemplary damages. Indeed, there is no mention -- not one single word -- in the *Plaintiff's Original Petition* about exemplary damages.

This case illustrates a key problem with arbitration -- the arbitrators may, either inadvertently or intentionally, enter an award clearly contrary to the law, yet that award might be upheld. Texas law simply does not allow the recovery of punitive damages for breach of contract, even if the breach is intentional, willful, and malicious. *See, e.g.,* ***Bellefonte Underwriters Ins. Co. v. Brown***, 704 S.W.2d 742, 745 (Tex. 1986); ***Amoco Prod. Co. v. Alexander***, 622 S.W.2d 563, 571 (Tex. 1981).

The Texas Supreme Court has held that in order to recover punitive damages attendant to a contract dispute a claimant must both (1) plead and (2) prove: (a) the commission of a separate tort, and (b) that the claimant sustained separate actual damages as a result of that separate tort. *See, e.g.,* ***International Bank, N.A. v. Morales***, 736 S.W.2d 622, 624 (Tex. 1987). Simply alleging, as Ms. Kline did, that the defaulting party to a contract allegedly also breached some tort duty, *e.g.*, a fiduciary duty or an implied duty of good faith and fair dealing, will not suffice. There must also be pleading and proof that the separate and distinct tortious conduct caused the claimant to sustain separate and distinct actual damages in tort. It is only the separate actual damages in tort that will support a claim for exemplary damages. *See, e.g.,* ***International Bank***, 736 S.W.2d at 624.

Interestingly, the Fourteenth Court properly held that Mr. O'Quinn owed no fiduciary duty to Kline. *See* 874 S.W.2d at 786-787 and Appendix A at pages A-18 through A-20. Moreover, Justice Ellis clearly pointed out in his dissent that Mr. O'Quinn owed no tort duty of good faith and fair dealing. *See* S.W.2d 874 at 789 and Appendix B at pages B-5 and B-6. The only other claim submitted to arbitration was Kline's *contract* claim. Texas law clearly

prohibits an award of punitive damages for mere breach of contract. But that is exactly the result of the Court of Appeals' decision.

Moreover, even if Ms. Kline had actually pled and proved that she was seeking to recover punitive damages based on separate actual damages in tort sustained as a result of breach of an alleged duty of good faith and fair dealing and/or an alleged fiduciary duty, she still would not be entitled to punitive damages. Neither a breach of the duty of good faith and fair dealing nor a breach of a fiduciary duty by itself entitles the injured party to punitive damages. In order to recover exemplary damages for breach of the duty of good faith and fair dealing or breach of fiduciary duty, a complainant must also plead and prove and obtain the additional finding of fraud, malice, or gross negligence. *See* TEX. CIV. PRAC. & REM. CODE § 41.003 (Vernon Supp. 1993); ***Arnold v. Nat'l County Mutual Fire Ins. Co.***, 725 S.W.2d 165, 168 (Tex. 1987); ***Manges v. Guerra***, 673 S.W.2d 180, 184 (Tex. 1984); ***Transportation Ins. Co, v, Moriel***, 879 S.W.2d 10 (Tex. 1994).

It appears that Ms. Kline requested punitive damages only at the conclusion of the arbitration proceedings and only after all of the evidence had been presented. It appears that Ms. Kline only then requested punitive damages and did so in a post final hearing brief. In such a situation, the arbitrators' award of punitive damages cannot stand because it exceeded their authority and constitutes an award on a matter not submitted. *See* TEX. REV. CIV. STAT. ANN. art. 237(A)(3) (award to be vacated when arbitrators exceed their authority) and art. 238(A)(2) (award to be modified when arbitrators award on a matter not submitted). Even if the Federal Arbitration Act supplies the governing law in accordance with

this Court's recent decision in ***Mastrobuono***, the Federal Arbitration Act, 9 U.S.C. § 10, provides for the vacating of the award when the arbitrators exceeded their powers.

The Texas Court of Appeals refused to examine the submissions to the arbitrators and simply *deferred* to their judgment. This approach shows a complete absence of judicial review, as is required under ***Oberg***. The injustice of the decision below is underscored when one considers the Court of Appeals' conclusion that Mr. O'Quinn had no fiduciary duty to Ms. Kline. As the dissent pointed out, the Court of Appeals rejected any possible legal basis for an award of punitive damages. *See* 874 S.W.2d at 788 and Appendix B. Nonetheless, the Court of Appeals' deference to the arbitrators and its refusal to review the award led it to reinstate an award of punitive damages which, by its own analysis, had absolutely no legal basis.

IV. The decision by the arbitrators to award punitive damages in a case where the parties did not specifically agree that the punitive damages may be awarded in the arbitration proceeding and the complainant did not request punitive damages should not be entitled to a deferential standard of review:

As stated above, the Fourteenth Court of Appeals in essence avoided all of the Due Process requirements of the United States Constitution and the requirements of Texas state law for the awarding of punitive damages by applying a deferential standard of review of the arbitrators' award. For example, the Texas Court of Appeals in this case deferred to the arbitrators as to "procedural matters such as the sufficiency of Kline's pleadings" and then presumed "adequate evidence to support the award." *See* 874 S.W.2d at 783 and Appendix A at A-11.

Similar to the issues under consideration at this time by this Court in ***Kaplan v. First Options of Chicago, Inc.***, 19 F.3d 1503 (3rd Cir. 1994), *cert. granted*, 115 S.Ct. 634 (1994), Mr. O'Quinn respectfully submits that reviewing courts should independently decide whether an arbitration panel has jurisdiction over the merits of any particular dispute. In a case where the parties did not specifically agree that the punitive damages may be awarded in the arbitration proceeding and the complainant did not request punitive damages, the arbitrators' award of punitive damages should not be entitled to a deferential standard of review. Indeed, this Court's holding in ***Oberg*** strongly suggests that, at least when arbitrators attempt to award punitive damages, Due Process requires judicial review of the arbitrators' authority to do so.

V. Mr. O'Quinn did not waive his right to present these important issues to this Court:

As a general rule, federal questions arising in State court must be properly set up and denied in the State court pursuant to State law in order to be reviewed by this Court. *See, e.g.*, ***Louisville & Nashville R.R. Co. v. Woodford***, 234 U.S. 46, 51 (1914). If the federal question was properly raised, then this Court's jurisdiction is not defeated merely because the highest court of the State declined to review the case. *See, e.g.*, ***Erie R.R. Co. v. Purdy***, 185 U.S. 148, 154 (1902).

The Texas Court of Appeals acknowledged that Mr. O'Quinn raised below the issue of whether lack of notice as to punitive damages violated his Constitutional right to Due Process. *See* 874 S.W.2d at 784 and Appendix A at A-12. The Court of Appeals in effect held that Mr. O'Quinn "waived" his Constitutional rights of Due Process by signing a contract containing an arbitration provision -- although the arbitration provision said nothing of any such waiver and did not bestow on the Arbitrators the right to award punitive damages. The Fourteenth Court of Appeals then declined to address Mr. O'Quinn's remaining Constitutional arguments on the basis that these arguments were not raised before the Trial Court. The Court of Appeals was incorrect on both counts.

First, under Texas law, Mr. O'Quinn was not required to raise his Constitutional arguments before the Trial Court. Mr. O'Quinn prevailed in the Trial Court. Ms. Kline, not Mr. O'Quinn, was the party who appealed from the Trial Court's *Final Judgment*. Under Texas law, as the prevailing party in the Trial Court and as the appellee in the Court of Appeals, Mr. O'Quinn was not required to argue to the Trial Court every alternative theory on which the Trial Court could have based its decision. ***Williams v. Khalaf***, 802 S.W.2d 651, 658 (Tex. 1990); ***Boyce Iron Works, Inc. v. Southwestern Bell Tel. Co.***, 747 S.W.2d 785, 787 (Tex. 1988). The Texas Supreme Court's decisions make it clear that an appellee has not waived an alternative basis for supporting the trial court's decision simply because Mr. O'Quinn, the <u>appellee</u> in the Court of Appeals, did not make the alternative argument in the Trial Court.

The proceedings below demonstrate why Mr. O'Quinn was not required to raise every possible argument before the Trial Court. At the first hearing involving the arbitration award, the Trial Court ruled from the bench in favor of Mr. O'Quinn. The Trial Court reaffirmed this ruling on several occasions, including at the pretrial conference. Given the Trial Court's rulings, there was no reason for Mr. O'Quinn to assert additional and alternative arguments to support the Trial Court's ruling. Doing so would have wasted the Trial Court's time, as the judge had already ruled. As in ***Williams*** and in ***Boyce Iron Works***, Mr. O'Quinn remained free to raise these alternative grounds for the Trial Court's ruling on appeal. Mr. O'Quinn did just that. Because these additional grounds for affirmance involve fundamental Due Process rights under the United States constitution, it is important for this Court to resolve these issues.

As authority for its conclusion that Mr. O'Quinn waived his Constitutional arguments, the Fourteenth Court cited ***Johnson v. Lynaugh***, 800 S.W.2d 936, 939 (Tex. App. -- Houston [14th Dist.] 1990, writ denied). However, ***Johnson*** involved waiver by an appellant, not an appellee. As noted, however, Mr. O'Quinn was the appellee. Mr. O'Quinn respectfully submits that ***Johnson*** simply does not apply here. Instead, ***Williams*** and ***Boyce Iron Works*** apply.

Second, Mr. O'Quinn in fact raised the issue of Due Process. Mr. O'Quinn raised before the Trial Court the issue that the award of exemplary damages by the arbitrators violated his rights afforded by the Due Process Clause of the United States Constitution. As noted above, Mr. O'Quinn specifically raised the issue in his *Opposition to Kline's Application for Decree*, *see* Appendix

O, Paragraph 9 at pages O-6 and O-7 and Paragraph 17 at page O-11, and his *Motion to Vacate, or, Alternatively, Modify and Correct Arbitration Award*, *see* Appendix P, Paragraphs 10, 11, 12 and 13 at pages P-8 through P-10 and Paragraph 21 at P-15 and P-16. Indeed, The Fourteenth Court of Appeals of Texas acknowledged that Mr. O'Quinn had raised the issue of whether lack of notice violated Due Process, *see* 874 S.W.2d at 784 and Appendix A at A-12.

In the Texas Court of Appeals, Mr. O'Quinn argued that the Due Process Clause of the United States Constitution requires that punitive damages be a sanction reserved to the courts where there are safeguards such as judicial review. *See* Mr. O'Quinn's *Brief of Appellee* filed with the Fourteenth Court of Appeals at Appendix K, pages K-14 through K-23. See Mr. O'Quinn's *Motion for Rehearing* filed with the Fourteenth Court of Appeals at Appendix L, pages L-17 through L-34. Mr. O'Quinn also submitted such issue to the Texas Supreme Court. *See Application for Writ of Error* at Appendix M, pages M-11 through M-21. *See Motion for Rehearing on Application for Writ of Error* at Appendix N, pages N-2 through N-5.

VI. Conclusion:

In this case, Due Process was violated. None of the Constitutional safeguards required by this Court with respect to the award of punitive damages, and the subsequent review of a punitive damages award, are found in an arbitration proceeding. For constitutional reasons, arbitrators should not be allowed to award punitive damages -- particularly in situations where the parties have not expressly authorized them to do so. If this Court allows arbitrators in situations such as this to award

punitive damages where the claimant did not seek punitive damages, and there was no notice that punitive damages might be in issue in the Arbitration Proceeding, and Texas law clearly does not allow the award of punitive damages under the facts of this dispute, all legal principles and the Constitutional safeguards applicable to the award of punitive damages will be circumvented through the arbitration process.

Contracting parties elect to submit their disputes to arbitration for the purpose of a private, speedy and fair resolution, without the delays and rigidities of a court trial. They expect the arbitration of their contractual disputes arising out of the contract. They do not expect the arbitrators to award punitive damages for breach of contract, particularly when the law does not allow the recovery of punitive damages for such a claim.

It is one thing for contracting parties to submit to arbitration the issue of contractual compensatory damages, which are largely based on objective criteria. But punitive damages are entirely different. They are subjective and take their shape from attitudes towards correction and reform. Because the award of punitive damages is so subjective, supervision by the courts is required. The need for supervision is heightened in arbitration proceedings because of the abbreviated discovery in arbitration (which can function to deny the defendant from developing the facts necessary to refute the plaintiff's allegations), the fact that arbitrators historically do not adhere to the rules of evidence and are willing to listen to anything, no matter how irrelevant, emotional and prejudicial, and because of the lack of any meaningful judicial review of arbitration awards.

Because one of the underlying theories of arbitration is that there should be minimal court review and supervision, allowing arbitrators to award punitive damages will lead to unpredictable, uncontrolled, and nonreviewable awards of punitive damages. This fails to comply with the requirements of the United States Constitution. Should this Court conclude that constitutional concerns do not require barring arbitrators completely from awarding punitive damages, those same concerns require that at the very least arbitrators may not award punitive damages except where the contracting parties have expressly granted them the authority to do so.

There is tension between ***Oberg***, which requires judicial review of jury awards of punitive damages, and ***Mastrobuono***, which suggests deference to an arbitrators' award of punitive damages. Given the absence of the traditional common law procedures in an arbitration proceeding, together with the widespread use of arbitration, the issues raised in this Petition for Certiorari are likely to repeatedly come before the courts. This Court, through a decision in this case, can establish an appropriate rule applicable to such cases.

The trial court's *Final Judgment* in this case eliminating the award of punitive damages against Mr. O'Quinn was entirely correct because the arbitrators were not authorized to award punitive damages. Mr. O'Quinn respectfully urges that the Court grant a Writ of Certiorari, reverse the decision of the Texas Court of Appeals, and affirm the Trial Court's *Final Judgment*.

Respectfully submitted,

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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

John M. O'Quinn, *Petitioner*,

v.

Donna C. Kline, *Respondent.*

Petition for Writ of Certiorari to the
Court of Appeals of Texas, Hosuton [14th District]

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

VOLUME 1

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APPENDIX A

Affirmed as Modified; Majority and Dissenting Opinions filed March 24, 1994.

(Seal)

In The
Fourteenth Court of Appeals

No. A14-93-00187-CV

DONNA C. KLINE, Appellant
V.
JOHN M. O'QUINN, THOMAS J. PEARSON, AND BANK ONE, TEXAS, N.A.,
Appellees

On Appeal from the 280th District Court
Harris County, Texas
Trial Court Cause No. 91-09787

MAJORITY OPINION

This is an appeal from a judgment modifying an arbitration award which was rendered in favor of appellant, Donna Kline, and against John O'Quinn, and Thomas Pearson. The judgment modified the arbitration award by deleting punitive damages assessed against appellee, O'Quinn and ordered that Kline take nothing in a trial against appellee, Bank One (successor-in-interest to MBank, N.A.). Although his name appears on the appeal bond, Pearson did not file a brief or raise points of error.

This dispute between attorneys arose out of a contract for contingent attorney's fees. On March 30, 1988, Kline and Pearson entered into an agreement with O'Quinn whereby O'Quinn agreed to pay expenses and assist on certain toxic tort and personal injury cases in return for a share of the attorney's fees ("the first attorneys' agreement"). Pursuant to their agreement, O'Quinn advanced substantial sums of money to Kline and Pearson. After signing the first attorneys' agreement, Kline and O'Quinn became aware that Bank One was a creditor of Pearson and that the bank claimed an interest in Pearson's share of attorney's fees in cases covered by the attorneys' agreement. As a result, Kline, Pearson and O'Quinn executed a second agreement ("the second attorneys' agreement).

Both agreements detailed a fee-sharing arrangement and contained a binding arbitration clause. In addition, the second attorneys' agreement acknowledged the existence of Bank One's interest and allocated to the bank, a portion of Pearson's share of fees in cases covered by the agreement. The agreement also provided that a portion of Pearson's fees would be used repay to O'Quinn for money he advanced to Kline and Pearson. The agreement further provided for repayment of a Pearson debt to Kline. Finally, the agreement, contained several provisions to protect the fee interests of Kline and O'Quinn. Among those provisions, was a condition that all settlement monies recovered in the cases covered by the agreement would be deposited in O'Quinn's client trust account for accounting and distribution.

Kline, Pearson, and O'Quinn then executed an agreement with Bank One ("the bank agreement"), which for the most part restated the provisions set out in the second attorneys' agreement but did not contain an arbitration provision. Thereafter, recoveries, either by settlement or by judgment, were received by both O'Quinn and Pearson on cases covered by the second attorneys' agreement. However, Kline was paid only a portion of her share of fees or not paid at all.

On March 8, 1991, Kline filed suit against O'Quinn and Pearson, alleging breach of contract, breach of fiduciary duty, and breach of a duty of good faith and fair dealing because of their failure to pay her certain contingent attorneys fees. Kline's original petition specifically invoked the arbitration provision of the second attorneys' agreement and prayed "that the court order arbitration of the disputes between Plaintiff and Defendants O'Quinn and Pearson." Bank One was named as a defendant, but no wrongdoing was alleged against the bank as it was not a party to the second attorneys' agreement. O'Quinn then filed a plea in abatement with the court to stay the proceedings pending arbitration. The court took no action on O'Quinn's motion.

Pursuant to the second attorneys' agreement, Kline filed a demand for arbitration with the American Arbitration Association (AAA). Kline also submitted a copy of her original petition to the AAA. The parties proceeded to arbitration in May 1992, and on June 22, 1992, the three-member arbitration panel found in favor of Kline and ordered both O'Quinn and Pearson to pay damages.[1]

O'Quinn's subsequently filed with the AAA, a "motion to partially modify and vacate arbitration." The arbitration panel affirmed its prior rulings and denied O'Quinn's motion on September 3, 1992. O'Quinn then filed a "motion to vacate, or alternatively, modify and correct

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[1] O'Quinn was ordered to pay Kline $249,316.02 plus pre-award interest of $41,552.67 and post-award interest. O'Quinn was also ordered to pay $50,000.00 in punitive damages. Pearson was ordered to pay Kline $105,523.20 plus pre-award interest of $17,587.20 and post-award interest. Pearson was also ordered to pay $25,000.00 in punitive damages. Kline was further awarded $1,261.23 from a case expense account funded by O'Quinn and $500.00 remaining in her own client trust fund.

arbitration award" in the trial court. That motion, like the earlier motion to the AAA, requested deletion of the $50,000.00 punitive damages award assessed against O'Quinn by the arbitrators.

Shortly thereafter, Kline filed an "application for decree," seeking confirmation of the arbitration award in its entirety. She also filed a first amended original petition, seeking confirmation of the award and alleging, for the first time, causes of action against Bank One. That pleading also sought attorney's fees. Kline later amended her petition in the trial court to include a claim for punitive damages against O'Quinn in the event that the arbitration award was not confirmed in its entirety. O'Quinn also filed a motion opposing Kline's application for decree and a "motion for judgment," both of which sought to confirm the arbitration award, less punitive damages.

The pleadings and documents in the record show that the trial court held several hearings to resolve issues raised by O'Quinn's motion to vacate or modify. A record of what transpired at all those hearings is not before this court. However, notwithstanding the lack of a complete record, an examination of the pleadings and documents and a review of the record of the pre-trial hearing in the Bank One case, reflect the totality of the trial court's rulings. The trial court ruled that the arbitrators had exceeded their authority by awarding punitive damages and by ordering payment of the award within thirty days after the award was signed. The court also ruled that Kline could not recover attorney's fees. The court further ruled that it would confirm the arbitration award, less punitive damages against O'Quinn, but refused Kline's request to litigate that issue or the issue of attorney's fees. The trial court then ruled that it would not enter judgment confirming the arbitration award as modified until the conclusion of the trial against Bank One.

The Bank One trial began on December 21, 1992. During the pre-trial hearing, the court ruled that because of its prior rulings, there were no issues to be litigated against O'Quinn; therefore, counsel for O'Quinn was not permitted to participate in the Bank One trial. After Kline rested, Bank One moved for a directed verdict, and after hearing argument, the trial court granted the motion. The trial court's final judgment, confirmed the arbitrators' award except for the punitive damages against O'Quinn, denied Kline's request for attorney's fees, and ordered that Kline take nothing from Bank One. Kline appeals from that final judgment raising three points of error. O'Quinn has since paid the compensatory damages of the final judgment and has filed a motion to dismiss this appeal.

Initially, we address O'Quinn's motion to dismiss. Exhibits attached to that motion reflect O'Quinn's payment and Kline's acceptance of compensatory damages plus interest pursuant to the trial court's final judgment. O'Quinn contends that Kline's acceptance of this payment satisfied the judgment and makes this appeal moot. O'Quinn's contention is without merit.

The general rule is that a party who accepts the benefits of a judgment is estopped from challenging the judgment by appeal. *Twin City Fire Ins. Co. v. Jones*, 834 S.W.2d 114, 115 (Tex. App.--Houston [1st Dist.] 1992, writ denied) (citing *Carle v. Carle*, 149 Tex. 469, 234 S.W.2d 1002, 1004 (1951)). There are two narrow exceptions to this rule. *Twin City*, 834 S.W.2d 115; *River and Beach Land Corp. v. O'Donnell*, 632 S.W.2d 885, 888 (Tex. App.--Corpus Christi 1982, no writ). First, a party is not estopped from appealing if a reversal of the judgment could not possibly effect that party's right to the benefit accepted under the judgment. *Id.* (citing *Carle*, 234 S.W.2d at 1004); *River and Beach*, 632 S.W.2d at 888. Second, a party is not estopped from appealing if the economic circumstances are such that the party's acceptance of the benefits was not voluntary. *Twin City*, 834 S.W.2d at 115;

River and Beach, 632 S.W.2d at 888. This case falls within the first exception.

The compensatory damages paid by O'Quinn and accepted by Kline were never the subject of this appeal. By her appeal, Kline only seeks "further" recovery of the punitive damages deleted from the arbitration award and attorney's fees in confirming the award. Thus, reversal of the judgment would merely allow Kline to recover a sum of money in addition to compensatory damages already accepted by her and would have no effect on those benefits she has secured under the judgment. *See Baptist Memorial Hosp. Sys. v. Bashara*, 685 S.W.2d 352, 353-54 (Tex. App.--San Antonio 1984), aff'd, 685 S.W.2d 307 (Tex. 1985) (held that hospital's acceptance of lien payment reduced by amount of attorney's fees of attorney representing injured client did not bar hospital from seeking higher lien payment on appeal). O'Quinn's motion to dismiss is denied.

In her first point of error, Kline contends "the trial court erred by rejecting rather confirming the arbitration award of exemplary damages against O'Quinn."

The trial court's judgment setting aside the award of punitive damages against O'Quinn states that ". . . such award fail[ed] to conform either to the parties' arbitration agreement or the relief sought . . ." and that ". . . the arbitrators exceeded the scope of their authority in attempting to award punitive damages." That "arbitrators exceeded their powers" is a statutory ground for vacating an award. TEX. CIV. STAT. ANN. art. 237, §A(3). That "arbitrators have awarded upon a matter not submitted to them" is a statutory ground for modifying or correcting an award. TEX. CIV. STAT. ANN. art. §238 A(2). Here, the trial court did not vacate the arbitration award, it only modified the award by deleting the punitive damages against O'Quinn. Therefore, the only issue before this court is: was the issue of punitive damages submitted to the arbitrators?

It is undisputed that: (1) in Texas, punitive damages may be awarded under appropriate circumstances, *see Transportation Ins. Co. v. Moriel*, 37 Sup. Ct. J. 450, 457-60 (February 2, 1994); (2) the trial court did not enter an order setting out the issues to be considered by the arbitrators or an order limiting the issues to be considered by the arbitrators; and, (3) the trial court did not know what evidence or issues were submitted to the arbitration panel because no record was made of the arbitration proceedings. Thus, the trial court's holding that the arbitration panel's award "failed to conform to the parties' arbitration agreement or relief sought" was of necessity limited to the construction of that agreement.

There is no dispute that the award was the result of binding statutory arbitration pursuant to the second attorneys' agreement, that the arbitration proceedings were in accordance with the Commercial Arbitration Rules rules of the AAA, that this court has jurisdiction, and that Texas law is applicable.

The second attorneys' agreement provided for *binding* arbitration in accordance with the rules of the AAA and that any court having jurisdiction could enter judgment on the award.

The arbitration provision in the second attorneys' agreement provided:

> Binding Arbitration. - In the event that *a dispute* arises among the Parties hereto, the Parties covenant to endeavor in good faith to resolve the dispute amicably. In the event that *a dispute* arises among Parties that cannot be amicably resolved or, Parties have elected to terminate this Agreement and are unable to reach an agreement to that end, said dispute shall be determined by arbitration conducted in the City of Houston, State of Texas, in accordance with the rules then in force of the American

> Arbitration Association, and judgment upon the award rendered may be entered in any court having jurisdiction thereof. The expenses of arbitration shall be shared equally among or between the arbitrating parties but each party shall be responsible for the fees of its own counsel. Said arbitration shall take place within thirty (30) days of request by any party, unless any party to the arbitration shall be in trial at the time in which case it shall take place within thirty (30) days after such trial is concluded.

[emphasis added]

Whether the parties' agreement imposes a duty to arbitrate a particular dispute is a matter of contract interpretation and a question of law for the court. *The Babcock & Wilcox Co. v. PMAC, Ltd.*, 863 S.W.2d 225, 230 (Tex. App.--Houston [14th Dist.] 1993, writ pending); *Lost Creek Util. v. Travis Indus, Painters*, 827 S.W.2d 103, 105 (Tex. App.--Austin 1992, writ denied). The law imposes a presumption in favor of arbitration which requires, whenever the scope of an arbitration is fairly debatable or reasonably in doubt, that the court decide the question of interpretation in favor of arbitration. *Babcock*, 863 S.W.2d at 230. This presumption is particularly applicable where the clause is broad, purporting to cover all claims, disputes, and other matters relating to the contract or its breach. *See Babcock*, 863 S.W.2d at 230; *see also Lost Creek.*, 827 S.W.2d at 105. Where there is a broad arbitration clause, arbitration of a particular grievance should not be denied unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. *Babcock*, 863 S.W.2d at 230; *Lost Creek.*, 827 S.W.2d at 105.

Kline contends that the parties contemplated arbitration of her tort claims and thus, punitive damages, when they agreed to arbitrate "a dispute that arises among the parties." We agree. Ordinary principles of contact law require

us to ascertain the true intentions of the parties as expressed in the *entire* contract. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). [emphasis added] Language used by the parties in contract should be accorded its plain grammatical meaning unless it definitely appears that the intentions of the parties would be thereby defeated. *Lyons v. Montgomery*, 701 S.W.2d 641, 643 (Tex. 1985). We must avoid, when possible and proper, a construction which is unreasonable, inequitable and oppressive. *Reilly v. Rangers Management Inc.*, 7272 S.W.2d 527, 530 (Tex. 1987).

Applying those principles to the above provision, we hold that the phrase, "a dispute that arises among the parties," in the absence of limiting language, encompasses Kline's tort causes of action and claim for punitive damages. *See USX Corp. v. West*, 781 S.W.2d 453, 455 (Tex. App.--Houston [1st Dist.] 1989, no writ) (holding that a "controversy" between parties may encompass different causes of action and claims for different types of damages, including punitive damages). Our broad reading of the arbitration provision is supported by O'Quinn's own pleadings. In his plea in abatement filed in the trial court prior to arbitration, O'Quinn declared that the arbitration provision provided for arbitration of "any and all controversies or claims arising out of or relating to the agreement."

Notwithstanding that pleading, O'Quinn now argues that the pleadings and proof submitted to the arbitrators by Kline do not support an award of punitive damages. There is nothing in our record to support or corroborate O'Quinn's argument. While a court may review whether a particular issue is within the scope of the parties' arbitration agreement, the enforcement of pleading requirements before the arbitrator is a procedural matter for the arbitrator. *See USX*, 786 S.W.2d 453 at 456.

In *USX*, Energy Buyers Service Corp. (Energy Buyers) asserted several causes of action arising from USX

Corp.'s (USX) alleged breach of a contract for the purchase of natural gas. 781 S.W.2d 454. The First Court of Appeals refused USX's attempt to mandamus the trial judge to require him to grant a motion to compel arbitration of certain tort claims asserted by Energy Buyers. *Id.* The court's refusal was based in part on its broad reading of the arbitration provision in the contract. 781 S.W.2d 454-56. The court reviewed both the arbitration agreement and documents filed in the pending arbitration before concluding that the claims asserted by Energy Buyers, including a claim for punitive damages, were before the arbitrator. 781 S.W.2d 455-56. Although Energy Buyers' pleading did not specifically refer to punitive damages, the court held that the enforcement of pleading requirements before an arbitrator is ordinarily a procedural matter for the arbitrator. *USX*, 781 S.W.2d at 456.

In so holding, the court in *USX* relied on *John Wiley & Sons v. Inc. v. Livingston*, 376 U.S. 543, 84 S. Ct. 909, 11 L. Ed. 898 (1964). In *Wiley*, a union sought to compel the corporate employer to arbitration pursuant to a collective bargaining agreement with the corporate employer who had merged with another corporation. 84 S. Ct. at 911. At issue, was whether the collective bargaining agreement survived the merger and whether arbitrators could decide whether certain procedural prerequisites to arbitration set out in the agreement had been satisfied. *Id.* As to the latter issue, the U.S. Supreme Court held that "*once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.* *Id.* at 918. [emphasis added] The court explained that "even under a contrary rule, a court could deny arbitration only if it could be said not only that a claim was strictly 'procedural,' and therefore within the purview if the court, but also that it should operate to bar arbitration altogether, and not merely limit or qualify the arbitral award." *Id.*

The court in *USX* also relied on *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145 (5th Cir. 1987). In *Webb*, a general contractor sought to compel the property owner and architect to arbitration. 823 F.2d at 146. The property owner and architect argued that the contractor did not comply with the contractual prerequisites to arbitration. *Id.* The district court made a finding to the contrary. 823 F.2d at 149. The court, citing *Wiley* and section 4 of the Federal Arbitration Act, vacated the district court's finding and held that only the arbitrators could decide the issue of the contractor's compliance. *Id.*

We agree with the holdings of *Wiley*, *Webb* and *USX*. O'Quinn's "pleadings" argument is not, as the U.S. Supreme Court explained, a "strictly procedural claim" which would operate to bar the arbitration altogether. Further, O'Quinn's claim bears on the final disposition of the parties' dispute in the sense that he seeks to interpret the scope of the arbitration agreement by reference to extrinsic evidence, i.e., Kline's pleadings. However, O'Quinn has never claimed that the parties agreement is ambiguous. In any event, the second attorneys' agreement specifically states that it "constitutes the entire agreement of the parties." Because we have already held that the arbitration provision in that agreement was broad enough to encompass Kline's tort causes of action and claim for punitive damages, we must defer to the arbitrators with regard to procedural matters such as the sufficiency of Kline's pleadings.

As to O'Quinn's argument that Kline did not prove in the arbitration that she was entitled to the punitive damages, we, like the trial court, do not have a record of the arbitration and are unable to determine what claims were submitted or what evidence was offered before the arbitrators. Without a transcription of the arbitration proceedings, we must presume adequate evidence to support the award. *House Grain Co. v. Obst*, 659 S.W.2d 903, 906 (Tex. App.--Corpus Christi 1983, writ ref'd n.r.e.).

O'Quinn next asserts that relitigation of punitive damages is barred by the doctrine of *res judicata*. While that may be true, Kline seeks to litigate the issue of punitive damages only in the event that we find that such an issue was not within the scope of the parties' arbitration agreement. Because we have determined that the issue of punitive damages was within the scope of the parties' agreement, we need not address O'Quinn's res judicata argument.

O'Quinn further contends that an award of punitive damages in an arbitration violates due process under the U.S. and Texas Constitutions. This argument is without merit. O'Quinn asserts that punitive damages is a sanction reserved to the forum of the courts where there are procedural safeguards such as judicial review. Because O'Quinn did not raise this argument in the trial court, it was waived. *Johnson v. Lynaugh*, 800 S.W.2d 936, 939 (Tex. App.--Houston [14th Dist.] 1990, writ denied). In fact, O'Quinn's only due process argument below was that he did not have sufficient notice that the arbitrators could award punitive damages. As evidenced by the allegations in his own pleadings, to wit; that the arbitration provision provided for arbitration of "any and all controversies or claims arising out of or related to the agreement," O'Quinn's position that he did not have notice that Kline might assert tort causes of action and a claim for punitive damages is untenable.

Lastly, O'Quinn asks us to adopt a public policy prohibiting punitive damages awards in arbitration. *See Garrity v. Lyle Stuart, Inc.*, 386 N.Y.S.2d 831, 353 N.E.2d 793 (1976). As an intermediate appellate court, it is not for us to forge the public policy of this State. Moreover, no Texas court has set aside a punitive damages award by arbitrators as being contrary to the public policy of this State and we refuse to do so. *See USX*, 781 S.W.2d at 455-56; *see also Grissom v. Greener & Sumner Constr. Co.*, 676 S.W.2d 709 (Tex. App.--El Paso 1984, writ ref'd n.r.e.) (citing TEX. CIV. STAT. ANN. art. article 237 §A(5) and holding that the trial court could not strike award of punitive damages as against public policy where the

parties expressly agreed to submit both contract and tort claims to arbitration).

Kline's first point of error is sustained.

In her second point of error, Kline contends "the trial court erred in not adjudicating the merits of [her] claim for post-arbitration attorney's fees against O'Quinn and Pearson."

Kline asserts that the trial court "summarily" denied her request for attorney's fees without an adjudication on the merits. She then proceeds to state the standard of review for summary judgments. This case does not involve an appeal from a summary judgment but an appeal from a proceeding to confirm an arbitration award. Moreover, pleadings and documents from that proceeding which are contained in the record reflect that Kline's request for attorney's fees was considered a number of times by the court and not "summarily" rejected.

As previously noted, the arbitration provision in the second attorneys' agreement specifically provided that "each party shall be responsible for the fees of its own counsel." Consistent with that provision, the arbitration award ordered that "each party shall bear its own attorney's fees." O'Quinn contends that Kline waived the right to attorney's fees because she did not complain about this aspect of the award within the ninety-day statutory period for modification. TEX. CIV. STAT. ANN. art. 238. We agree. The arbitration award was rendered on June 22, 1992, but Kline did not file her first amended original petition seeking attorney's fees in connection with confirmation of the award until September 24, 1992, ninety-four

days after the award was rendered.[2] Kline has waived any complaint regarding the arbitrators' award of attorney's fees.

Kline contends that a motion to modify was not required because the arbitration award refers only to recovery of attorney's fees incurred during the arbitration, not to "post-arbitration" attorney's fees. Kline asserts that her right to attorney's fees in connection with her efforts to confirm the award was never submitted to arbitration. She maintains that the court should have adjudicated the issue of "post-arbitration" attorney's fees or referred the matter to arbitration as "a dispute among the parties" which arose following arbitration.

We disagree with Kline's contention that the arbitration award does not apply to proceedings to confirm the award. Confirmation of an arbitration award is part and parcel of the arbitration process. *See* TEX. CIV. STAT. ANN. arts. 235, 236 (Vernon 1973). Kline invoked the jurisdiction of the trial court by filing her original petition asking the court to order arbitration. As a result, Kline was required as part of the arbitration enforcement process to return to the trial court to confirm the award and make it into an enforceable final judgment. In view of the parties agreement to pay their own attorney's fees for arbitration, and in view of the fact that the arbitrators' award is consistent with that agreement, we find that the trial court properly refused to award attorney's fees to Kline.

We also note that Kline could not recover attorney's fees under the Civil Practices and Remedies Code

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[2] The arbitrators rendered a "second award," denying O'Quinn's initial motion to vacate or modify. That award was rendered on September 3, 1992. The question of whether this second award altered the time limits for bringing a motion to modify has not been raised on appeal and therefore, is not before us.

which sets forth the types of claims upon which attorneys fees are recoverable. Among those claims are claims for personal services rendered and claims on oral and written contracts. TEX. CIV. PRAC. & REM. CODE ANN. § 38.0001 (Vernon 1988). Whether the claims asserted by Kline are for personal services or based on contract, those claims have been merged into the arbitration award and her action to enforce that award gives rise to a new and different cause of action for which there is no statutory basis for recovery of attorneys' fees. *See Babcock*, 863 S.W.2d at 236 (holding that proceeding to confirm an arbitration award is in the nature of an enforcement proceeding, not a contract claim); *see also Kermacy v. First Unitarian Church of Austin*, 361 S.W.2d 734, 736 (Tex. App.--Austin 1962, writ ref'd n.r.e.) (holding that on claim for architectural services rendered, architect could not recover attorneys' fees in action to vacate arbitration award in his favor).

We hold that the trial court did not err in refusing to award attorney's fees in connection with Kline's post-arbitration efforts to confirm the award.

Kline's second point of error is overruled.

In her third point of error, Kline contends "the trial court erred in directing a verdict in favor of Bank One."

An instructed verdict is proper: (1) when a defect in the opponent's pleadings makes them insufficient to support a judgment; (2) when the evidence conclusively proves a fact that establishes a party's right to judgment as a matter of law; or (3) when the evidence offered on a cause of action is insufficient to raise an issue of fact. *Anderson v. Vinson Exploration, Inc.*, 832 S.W.2d 657, 661 (Tex. App.--El Paso 1992, writ denied).

In reviewing the trial court's granting of a directed verdict, we must determine whether there is any evidence of

probative force to raise fact issues on the material questions presented. *Quantel Business Sys. v. Custom Controls*, 761 S.W.2d 302, 304 (Tex. 1988); *White v. Southwestern Bell Tel. Co.*, 651 S.W.2d 260, 262 (Tex. 1983); *Collora v. Navarro*, 574 S.W.2d 65, 68 (Tex. 1978). We must consider the evidence in the light most favorable to the party against whom the verdict was instructed, disregarding all contrary evidence and inferences. *Quantel*, 761 S.W.2d at 304; *White*, 651 S.W.2d at 262, *Collora*, 574 S.W.2d at 68. If there is any conflicting evidence of a probative nature on a material issue, the directed verdict is improper and the judgment must be reversed and the case remanded for the jury's determination of that issue. *Quantel*, 761 S.W.2d at 304; *White*, 651 S.W.2d at 262.

In her third amended original petition, Kline alleged causes of action against Bank One for breach of contract, breach of good faith and fair dealing, and for "knowingly and actively participating in breaches of fiduciary duty" by O'Quinn and Pearson. The trial court granted a directed verdict on Kline's breach of contract claim on the ground that Bank One had no duty under the bank agreement to account for funds to Kline. It also granted a directed verdict on Kline's breach of good faith and fair dealing claim because no "special relationship" giving rise to such a claim existed between Kline and Bank One. Finally, the trial court granted a directed verdict on Kline's breach of fiduciary duty claim because Bank One's conduct did not enable O'Quinn or Pearson to breach any fiduciary duty.

While her argument focuses primarily on the breach of fiduciary duty, Kline argues generally that the trial court erred in concluding that Bank One owed "no duty." Kline's argument fails. Bank One owed no duty to Kline under the bank agreement because that agreement merely allocated a portion of the Pearson's share of fees in certain cases to Bank One. It designated the cases covered by the agreement and specified Pearson's share of the fees in those cases. The bank agreement did not impose any affirmative obligation or duty on

Bank One to account for Kline's share of fees or to assert a claim on her behalf.

As for Kline's allegations of breach of a duty of good faith and fair dealing, Bank One did not owe such a duty as a matter of law. The courts of this State do not generally recognize the existence of a "special relationship" giving rise to an independent duty of good faith and fair dealing in contract outside of the insurance context or the public sector. *See Crim Truck & Tractor v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 595, n. 5 (Tex. 1992); *see also Houston Cable TV, Inc. v. Inwood West Civic Ass'n.*, 839 S.W.2d 497, 503 (Tex. App.--Houston [14th Dist.] 1992), *writ dism'd per curiam*, 860 S.W.2d 22 (Tex. 1993) (on motion for rehearing).[3] In any event, we find no evidence of a special relationship between Kline and Bank One sufficient to give rise to an independent duty of good faith and fair dealing.

As for Kline's breach of fiduciary duty claim, "it is settled law of this State that where a third party knowingly participates in the breach of duty of a fiduciary, such third party becomes joint a tortfeasor with the fiduciary and is liable as such." *Kinzbach Tool Co. v. Corbett Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 514 (1942); *Tinney v. Team Bank*, 819 S.W.2d 560, 564 (Tex. App.--Fort Worth 1991, writ denied); *Horton v. Robinson*, 776 S.W.2d 260, 266 (Tex. App.--El Paso 1989, no writ); *Chien v. Chen*, 759 S.W.2d 484, 487 n. 2 (Tex. App.--Austin 1988, no writ). Thus, Bank One cannot be liable

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[3] Where the Supreme Court, upon the parties' joint motion, grants an application for writ of error, sets aside judgments of the Court of Appeals and the trial court without reference to the merits, and remands to trial court for entry of judgment in accordance with the settlement agreement of the parties, the Court of Appeals' opinion is not vacated and its precedential value is equivalent to a "writ dismissed" case. 860 S.W.2d at 73 n. 3.

to Kline unless O'Quinn and Pearson owed her a fiduciary duty.

A fiduciary duty arises from the relationship of the parties and not just from the contract. *See Crim Truck*, 823 S.W.2d at 594-97. A fiduciary relationship exists when the parties are under a duty to act for or give advice for the benefit of another upon matters within the scope of the relation. *American Medical Int'l, Inc. v. Giurintano*, 821 S.W.2d 331, 339 (Tex. App. -- Houston [14th Dist.] 1991, no writ) (opinion on motion for rehearing). It exists where a special confidence is placed in another who is bound to act in good faith and with due regard to the interests of the one placing confidence. *Id.* A fiduciary relationship may include informal relationships such as moral, social, domestic or purely personal relationships that are created by one party placing implicit trust and reliance on another. *Id.* However, a fiduciary relationship is extraordinary one and will not be lightly created; the mere fact that one subjectively trusts another does not alone, indicate that confidence is placed in another in the sense demanded by fiduciary relationships because something apart from the transaction between the parties is required. *Id.* As the Supreme Court recently explained:

> The fact that one businessman trusts another, and relies upon his promise to perform a contract does not rise to a confidential relationship. Every contract includes an element of confidence and trust that each party will faithfully perform his obligation under the contract. Neither is the fact that the relationship has been a cordial one, of long duration, evidence of a confidential relationship.

Crim Truck, 823 S.W.2d at 594-95.

Thus, not every business relationship gives rise to a fiduciary duty. *See Crim Truck*, 823 S.W.2d at 594-97. The question of whether a confidential relationship exists giving rise

to an informal fiduciary relationship is ordinarily one of fact, unless the issue is one of "no evidence;" then it is a question of law. *Id.* at 594. Because a directed verdict presents a question of "no evidence," we are dealing with a question of law.

At least one other court has recognized the existence of a fiduciary relationship between a named partner in a law firm and his associates. *Bray v. Squires*, 702 S.W.2d 266, 270 (Tex. App.--Houston [1st Dist.] 1985, no writ) (citing *Kinzbach* and holding that a lawyer's duty to make full disclosure to other members of firm about matters affecting firm business was incident to the parties' employer-employee relationship). Here, the second attorneys' agreement provided that the parties were to treat each other "fairly and in good faith" and that "Kline would be an "associate" of O'Quinn's law firm "for purposes of the agreement." The agreement also provided that "monies recovered or received by way of settlement" were to be deposited in O'Quinn's client trust account "for accounting and distribution.

We are unwilling to impose a fiduciary duty upon O'Quinn and Pearson simply because of their business ties to Kline. The parties freely negotiated the terms of their agreement. Neither the allegations in Kline's third amended petition nor the evidence presented at trial give rise to a fiduciary duty outside of the second attorneys' agreement. The only evidence of a confidential relationship is Kline's testimony that she trusted O'Quinn to handle the settlement proceeds in accordance with the agreement and her testimony that she and Pearson had been acquainted over a period of time, that they had shared an office for several months, and that they had participated in a long trial together. We hold that such evidence amounts to no more than a mere scintilla and is no evidence. *See Crim Truck*, 823 S.W.2d at 594-95; *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983).

We hold that the trial court correctly ruled that O'Quinn and Pearson did not owe a fiduciary duty to Kline and

properly directed a verdict in favor of Bank One on this cause of action.

Kline's third point of error is overruled.

We reverse that part of the trial court's judgment striking the arbitrators' award of $50,000.00 in punitive damages and render judgment that Kline recover from O'Quinn $50,000.00 in punitive damages. The remainder of the trial court's judgment is affirmed.

/s/ Jackson B. Smith, Jr.
Justice (retired)*

Judgment rendered and Opinion filed March 24, 1994.

Panel consists of Justices Murphy, Ellis and Smith.

Publish - TEX. R. APP. P. 90.

* Justice Smith sitting by assignment of the Texas Supreme Court.

APPENDIX B

Affirmed as Modified; Majority and Dissenting Opinions filed March 24, 1994.

(Seal)

In The
Fourteenth Court of Appeals

No. A14-93-00187-CV

DONNA C. KLINE, Appellant
V.
JOHN M. O'QUINN, THOMAS J. PEARSON, AND BANK ONE, TEXAS, N.A.,
Appellees

On Appeal from the 280th District Court
Harris County, Texas
Trial Court Cause No. 91-09787

DISSENTING OPINION

I agree with the court's opinion regarding attorney's fees and the directed verdict rendered in favor of Bank One. However, I respectfully dissent from that part of the court's opinion upholding the arbitrators' award of punitive damages.

Kline submitted a Demand For Arbitration and a copy of her Original Petition to the AAA. The Demand for Arbitration, which was submitted to the AAA first, defines the

"nature of the dispute" as a "disagreement among attorneys over contingent fee recoveries." As to the "claim or relief sought," Kline's demand states only that an amount "is unable to be determined without discovery from respondents." The demand does not mention tort claims or punitive damages. The subsequent cover letter to the AAA accompanying her Original Petition declares that this pleading "states Ms. Kline's position on the matters in controversy **more clearly** than the papers previously submitted." As evidenced by Kline's correspondence to the AAA, Kline's Original Petition was intended to define the claims before the arbitrators as stated in her Demand for Arbitration and the parties' agreement.

O'Quinn contends that he relied on Kline's Original Petition in preparing his defense in the arbitration and that Kline's petition does not support a recovery of punitive damages as a matter of law. O'Quinn's contention is correct. The majority cites *USX* in holding that we are unable to review the sufficiency of pleadings before the arbitrators. However, in *USX*, the court reviewed the broad arbitration provision in the parties' contract, the commercial rules of arbitration, and documents filed in the arbitration before determining that the issue of punitive damages was before the arbitrators. *USX Corp. v. West*, 781 S.W.2d 453, 455 (Tex. App.--Houston [1st Dist.] 1989) (original proceeding).

In contrast to the arbitration provision in *USX*, I would not read the arbitration provision in this case as broadly as the majority does. The arbitration provision at issue here provides that the parties would arbitrate "a dispute," not "any controversy." *See USX*, 781 S.W.2d at 454. Kline specifically informed the AAA that "a dispute" meant a "disagreement among attorneys over contingent fee recoveries." In other words, a dispute about the subject matter of the parties' contract. Section 43 of the Commercial Arbitration Rules of the AAA provides that "the arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and **within the scope of the agreement of the parties** . . . ." COLUMBIA

UNIVERSITY, GUIDE TO INTERNATIONAL ARBITRATION AND ARBITRATORS, 137, 148 (2d ed. 1992). [emphasis added] In this case, Kline's claim for punitive damages is beyond the scope of the agreement of the parties.

Where an arbitration clause is narrowly drawn, judicial review of the arbitrator's jurisdiction as opposed to the merits of the arbitration award, is less deferential. *The Babcock & Wilcox Co. v. PMAC*, 863 S.W.2d 225, 230 (Tex. App.--Houston [14th Dist.] 1993, writ pending) (citing *Container Prods., Inc. v. United Steelworkers of Am. and Its Local 5651*, 873 F.2d 818, 819-20 (5th Cir. 1989)). In the instant case, we are confronted not only with a narrow arbitration provision, but also with a pleading which was intended to broaden the scope of that provision. Therefore, I would not defer to the arbitrators with regard to the sufficiency of that pleading.[1]

In her Original Petition, Kline alleged causes of action against O'Quinn and Pearson for breach of contract, breach of a duty of good faith and fair dealing, and breach of a fiduciary duty. She alleged that O'Quinn and Pearson failed to pay her share of fees in the cases covered by the Second Attorneys' Agreement. Specifically, she alleged that O'Quinn

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[1] Notwithstanding Kline's correspondence and pleadings submitted to the AAA, the majority points out that verbiage in O'Quinn's plea in abatement which requested arbitration of "all controversies or claims arising out of or relating to the [Second Attorneys'] Agreement" indicates that the arbitrators were to consider all matters, including punitive damages. As noted by the majority, the trial court never ruled on O'Quinn's plea in abatement nor was that motion submitted to the arbitrators. More importantly, that defensive pleading in no way enlarged or enhanced the allegations in Kline's Original Petition, which *was* submitted to the arbitrators.

and Pearson failed to disclose the receipt "in trust" of settlement proceeds in cases covered by their agreement and then disbursed those proceeds without her knowledge or consent. There was no allegation of constructive trust or fraud. There was also no allegation of conscious indifference on the part of O'Quinn or Pearson and no allegation that their conduct was likely to cause serious harm to Kline. *See Transportation Ins. Co. v. Moriel*, 37 Sup. Ct. J. 450, 458-59 (February 2, 1994).

"A dispute arising under or out of a contractual relationship may give rise to both breach of contract and tort claims at the same time since the breach of duty under the contract may involve tortious conduct." *Valero Energy Corp. v. Wagner & Brown II*, 777 S.W.2d 564, 566 (Tex. App.--El Paso 1989, writ denied). However, to recover punitive damages attendant to a contract dispute, a plaintiff must plead and prove a distinct tortious injury with accompanying actual damages. *See e.g. Moriel*, 37 Sup. Ct. J. at 455; *Southwestern Bell Tel. Co., v. DeLanney*, 809 S.W.2d 493, 494-95 (Tex. 1991) *International Bank, N.A. v. Morales*, 736 S.W.2d 622, 624 (Tex. 1987); *Texas Nat'l Bank v. Karnes*, 717 S.W.2d 901, 903 (Tex. 1983) (and cases cited therein); *Jim Walter Homes v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986); *Belefonte Underwriters Co., v. Brown*, 704 S.W.2d 742, 744 (Tex. 1986). Punitive damages are not recoverable for breach of contract alone. *Karnes*, 717 S.W.2d at 903. In determining whether an action is in tort or in contract, we must look to the substance of the cause of action, not the manner in which it was pleaded. *Jim Walter Homes*, 711 S.W.2d at 618.

As stated by the Texas Supreme Court:

> The acts of a party may breach duties in tort or contract alone or simultaneously in both. The nature of the injury most often determines which duty or duties are breached. When the injury is only the

> economic loss to the subject of a contract itself the action sounds in contract alone.

Southwestern Bell Tel. Co, 809 S.W.2d at 495 (citing *Jim Walter Homes*, 711 S.W.2d at 618).

Kline's only claim of tort liability is for breach of a duty of good faith and fair dealing and for breach of a fiduciary duty. As for her claim of breach of a duty of good faith and fair dealing, Kline alleged a breach based solely on the fact that the parties' agreement provided that the parties were to treat each other "fairly and in good faith." "If an action is not maintainable without pleading and proving the contract, where the gist of the action is the breach of the contract, either by malfeasance or nonfeasance, it is in substance an action on the contract, whatever may be the form of the pleading." *International Printing Pressmen and Assistants' Union Am. v. Smith*, 145 Tex. 399, 198 S.W.2d 729, 735 (1949). Here, the substance of Kline's claim is based solely on the alleged breach of the Second Attorneys' Agreement. Because her cause of action for breach of a duty of good faith and fair dealing is not maintainable without reference to the parties' contract, Kline failed to state a proper tort cause of action.

As the majority correctly observed, a cause of action for breach of the duty of good faith and fair dealing is generally not recognized in contract outside of the insurance context or the public sector. *See Crim Truck & Tractor v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992); *Houston Cable TV, Inc. v. Inwood West Civic Assoc.*, 839 S.W.2d 497, 503 (Tex. App.--Houston [14th Dist.] 1992), writ dism'd, 860 S.W.2d 22 (Tex. 1993). Aside from those circumstances, an allegation of breach of a duty of good faith and fair dealing gives rise only to a cause of action for breach of contract. *See Crim Truck*, 823 S.W.2d at 595, n. 5. As previously noted, Kline's claim of a breach of good faith and fair dealing is nothing more than a claim for breach of contract. As a result,

Kline could not recover punitive damages as a matter of law on that basis.

The same is true of her claim of a breach of fiduciary duty. Similar to her other tort claim, Kline alleges a fiduciary duty on the part of O'Quinn and Pearson simply because the parties agreement provided: (1) that Kline's share of fees would be paid from settlement proceeds deposited in O'Quinn's client trust account; and, (2) that Kline would be an "associate" of O'Quinn's law firm for purpose of handling cases covered by the agreement.

A fiduciary duty arises from the relationship of the parties and not just from the contract. *See Crim Truck*, 823 S.W.2d at 594-97. In the instant case, Kline does not allege the existence of a confidential relationship which would give rise to a fiduciary duty outside of the parties' contract. *See Crim Truck*, 823 S.W.2d at 594-97; *see also American Medical Int'l, Inc. v. Giurintano*, 821 S.W.2d 331, 339 (Tex. App.--Houston [14th Dist.] 1991, no writ) (opinion on motion for rehearing). Thus, Kline failed as a matter of law to state a cause of action for breach of fiduciary duty and was barred from recovering punitive damages on that ground.

Similarly, Kline's only claim of injury was economic and to the subject matter of the contract, i.e., her share of contingent attorneys' fees owed under the Second Attorneys' Agreement. Economic injury to the subject matter of the contract will not automatically preclude a punitive damages award especially where there is an allegation of fraud. *See Houston Cable*, 839 S.W.2d at 503; *see also Schindler v. Austwell Farmers Co-Op*, 829 S.W.2d 283, 289-91 (Tex. App.--Corpus Christi 1992) (opinion on motion for rehearing), *aff'd as modf'd*, 841 S.W.2d 853 (Tex. 1992).

As previously noted, Kline's Original Petition did not allege fraud or intentional conduct of any kind (i.e., malice or conscious indifference) nor did it specify punitive damages.

Her petition requested actual damages, interest, attorney's fees, declaratory relief, and "such other and further relief, whether at law or in equity, whether general or special, to which she may show herself to be entitled."

It is well-settled that a pleading is sufficient only if it gives an opposing party fair and adequate notice of the claims at issue. *See Garvey v. Vawter*, 795 S.W.2d 741, 742 (Tex. 1990) (per curiam). A general prayer for relief cannot enlarge a pleading to the extent that it embraces an entirely different cause of action for which fair notice does not exist. *Stoner v. Thompson*, 578 S.W.2d 679, 684 (Tex. 1979). Only the relief consistent with the theory of the claim reflected in the petition may be granted under a general prayer. *Kissman v. Bendix Home Sys.*, 587 S.W.2d 675, 677 (Tex. 1979). The only viable theory of recovery alleged in Kline's Original Petition was for breach of contract. The general prayer contained therein cannot be read to provide relief not pled. Thus, Kline's Original Petition not only failed to state a claim upon which punitive damages could have been awarded, but also did not give O'Quinn fair and adequate notice that punitive damages could have been awarded by the arbitrators.[2]

I recognize that every reasonable presumption is indulged to uphold arbitration proceedings. *Riha v. Smulcer*, 843 S.W.2d 289, 292 (Tex. App.--Houston [14th Dist.] 1992, writ denied); *Massey v. Galvan*, 822 S.W.2d 309, 316 (Tex. App.--Houston [14th Dist.] 1992, writ denied). However, in view of the fact that Kline's Original Petition was intended to define the scope of the arbitration under the parties' agreement and the fact that this pleading did not allege facts which would support an award of punitive damages, I would hold that the trial court correctly determined that the arbitrators rendered an

---

[2] Similar to her petition, Kline's post-evidentiary brief filed in the arbitration requested punitive damages based solely on the breach of the parties' agreement.

award on a matter not submitted to them and that the trial court properly struck the punitive damages award against O'Quinn.

I would also note that such a holding is compelled by the fact that this court is without a complete record. The record before this court does not include a transcription of the arbitration proceeding. The majority, citing *House Grain Co. v. Obst*, 658 S.W.2d 903, 906 (Tex. App.--Corpus Christi 1983, writ ref'd n.r.e.), holds that without a transcription of the arbitration proceeding, the court must presume adequate evidence to support the award. The case relied upon in *House Grain* for the aforementioned proposition, *City of San Antonio v. McKenzie Constr.*, 150 S.W.2d 989, 996 (Tex. 1941), says nothing of the kind, but merely recites the general rule requiring that all reasonable presumptions be indulged in favor of the award.

In the absence of a complete record, we must presume that evidence before the trial court supported its judgment. *Beck & Masten Pontiac-GMC v. Harris County Appraisal Dist.*, 830 S.W.2d 291, 295 (Tex. App.--Houston [14th Dist.] 1992, writ denied) (*citing* TEX. R. APP. P. 50(d)). While Section 23 of the Commercial Arbitration Rules of the AAA does not place the burden on any party to request a "stenographic record" of the arbitration proceedings, the rules of appellate procedure clearly place the burden on the appellant "to see that a sufficient record is presented to show error requiring reversal." TEX. R. APP. P. 52(d); COLUMBIA UNIVERSITY, *supra* at 143. Because Kline did not bring forth a complete record on appeal, this court must presume the evidence before the trial court supported its judgment. *See Beck & Masten*, 830 S.W.2d at 295.

Accordingly, I would overrule Kline's first point of error and affirm the judgment of the trial court.

/s/ George T. Ellis
Justice

Judgment Rendered and Majority and Dissenting Opinions filed March 24, 1994.

Panel Consists of Justices Murphy, Ellis and J. Smith.*

Publish - TEX. R. APP. P. 90.

* Justice Smith sitting by assignment of the Texas Supreme Court.

APPENDIX C

Motions for Rehearing Overruled and
Supplemental Opinion filed May 12, 1994.

In The
Fourteenth Court of Appeals

NO. A14-93-00187-CV

DONNA C. KLINE, Appellant

V.

JOHN M. O'QUINN, THOMAS J. PEARSON,
BANK ONE, TEXAS, N.A., Appellees

On Appeal from the 289th District Court
Harris County, Texas
Trial Court Cause No. 91-09787

OPINION ON MOTIONS FOR REHEARING

In her motion for rehearing, Kline requests interest on the $50,000.00 punitive damages award in accordance with the arbitrators' ruling. We find Kline's request to be meritorious. It is hereby ordered that the trial court's judgment be modified to award Kline interest on the $50,000.00 in punitive damages at the rate of ten percent (10%) per annum commencing from June 15, 1992, until paid. Kline's motion for rehearing is in all other respects overruled.

In his motion for rehearing, O'Quinn contends that he did not waive constitutional arguments in support of vacating or modifying the arbitrator's punitive damages award. Although O'Quinn does not dispute that he failed to raise constitutional grounds in the trial court, he contends that, as the appellee, he is under no obligation to argue every alternative theory in support of the trial court's judgment. *See Williams v. Khalaf,* 802 S.W.2d 651, 658 (Tex. 1990).

While O'Quinn is before this court in the procedural posture of appellee, O'Quinn was the non-prevailing party in arbitration. As the losing party seeking to modify or vacate the arbitrators' award, O'Quinn had the burden in the trial court of bringing forth a complete record and of establishing any basis, including constitutional grounds, which would warrant vacating or modifying the arbitrators' award. *See Grissom v. Greener & Sumner Constr. Co.*, 676 S.W.2d 709, 710-11 (Tex. App.--El Paso 1984, writ ref'd n.r.e.) (appellee, as the losing party in arbitration, had the burden in the trial court of establishing facts which would warrant vacating of arbitration award); *see also Atrium Westwood VII Venture v. Barrick Westwood Limited Partnership*, 693 S.W.2d 699, 700-701 (Tex. App.--Houston [14th Dist.] 1985, no writ) (same, except appellant was the losing party in arbitration). O'Quinn did not present his constitutional arguments to the trial court and, therefore, waived those grounds for this appeal. *See Grissom*, 676 S.W.2d at 710-711; *see also Atrium Westwood*, 696 S.W.2d at 700-701; *Mullinax, Wells, Baab and Cloutman v. Sage*, 692 S.W.2d 533, 536 (Tex. App.--Dallas 1985, writ ref'd n.r.e.) (opinion on motion for rehearing) (law firm waived attorney's fees by not raising claim in the trial court during proceeding to set aside arbitration award). O'Quinn's motion for rehearing is overruled.

In accordance with our original opinion, we hereby reverse that part of the trial court's judgment, striking the arbitrators' award of $50,000.00 in punitive damages, and render judgment that Kline recover from O'Quinn $50,000.00

in punitive damages, plus interest at the rate of ten percent (10%) per annum commencing from June 15, 1992, until paid. The remainder of the trial court's judgment is affirmed.

/s/ Jackson B. Smith Jr.
Justice (retired)*

Motions for Rehearing Overruled and Supplemental Opinion filed May 12, 1994.

Panel consists of Justices Murphy, Ellis and J. Smith.*
(Justice Ellis dissents.)

Publish - TEX. R. APP. P. 90.

*Justice Smith sitting by assignment of the Texas Supreme Court.

APPENDIX D

THE SUPREME COURT OF TEXAS
P. O. BOX 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

December 1, 1994

Mr. Michael A. Johnson
The Lyric Centre
440 Louisiana, Suite 2050
Houston, TX 77002

Ms. Cheryl E. Irvin
Irvin & Burnett
440 Louisiana
Suite 2050
Houston, TX 77002

Mr. J. Clark Martin
Vinson & Elkins
1001 Fannin Street
2715 First City Tower
Houston, TX 77002-6760

Mr. Steven Borgman
Vinson & Elkins
2715 First City Tower
1001 Fannin
Houston, TX 77002-6760

Mr. Thomas J. Pearson
6100 Hillcroft
Suite 500
Houston, TX 77081-1006

Mr. Norman Riedmueller
12 Greenway Plaza,
Suite 909
Houston, TX 77046-1202

Mr. Michael A. Pullara
1111 Hermann Drive, Suite 25A
Houston, TX 77004

RE: Case No. 94-0780

Style: JOHN M. O'QUINN
v. DONNA C. KLINE

Dear Counsel:

Both applications for writ of error in the above referenced case were this day denied with the notation, Writ Denied.

Respectfully yours,

John T. Adams, Clerk

BY: /S/ MIA ZIERLEIN
Mia Zierlein, Deputy Clerk

APPENDIX E

THE SUPREME COURT OF TEXAS
P. O. BOX 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

January 12, 1995

Mr. Michael A. Johnson
The Lyric Centre
440 Louisiana, Suite 2050
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Ms. Cheryl E. Irvin
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Mr. Steven Borgman
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Mr. Thomas J. Pearson
6100 Hillcroft, Ste. 500
Houston, TX 77081-1006

Mr. Norman Riedmueller
12 Greenway Plaza, Ste 909
Houston, TX 77046-1202

Mr. Michael A. Pullara
1111 Hermann Drive, Suite 25A
Houston, TX 77004

RE: Case Number: 94-0780

Style: JOHN M. O'QUINN
v. DONNA C. KLINE

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

JOHN T. ADAMS, CLERK

BY:/S/ MICHAEL C. MURPHEY
Michael C. Murphey, Deputy Clerk

APPENDIX F

NO. 91-009787

Donna C. Kline	§	In the District Court of
	§	
VS.	§	
	§	Harris County, Texas
John M. O'Quinn,	§	
Thomas J. Pearson, and	§	
BankOne, N.A.	§	280th Judicial District

FINAL JUDGMENT CORRECTING, MODIFYING AND CONFIRMING AWARD OF ARBITRATORS AS AMONG DONNA C. KLINE, JOHN M. O'QUINN AND THOMAS J. PEARSON, AND TAKE NOTHING JUDGMENT AS BETWEEN DONNA C. KLINE AND BANKONE, N.A.

BE IT REMEMBERED that this Cause was initiated by Donna C. Kline against Thomas J. Pearson, John M. O'Quinn, and BankOne, N.A. The disputes among Donna C. Kline, Thomas J. Pearson, and John M. O'Quinn were then submitted to arbitration in Arbitration Proceeding 70-194-0030 before the American Arbitration Association. There was an Award of Arbitrators issued June 22, 1992 by the Arbitrators in Arbitration Proceeding 70-194-0030 and a subsequent instrument also entitled Award of Arbitrators was signed on August 31, 1992, September 1, 1992 and September 3, 1992 by the Arbitrators (both of which Awards are referred to herein cumulatively as the "Award of Arbitrators"). The disputes as between Donna C. Kline and BankOne, N.A. were reserved for trial in this Cause.

BE IT FURTHER REMEMBERED that on October 2, 1992 there came on for consideration by this Court John M. O'Quinn's Motion to Vacate or Alternatively Modify and

Correct Arbitration Award filed with respect to the Award of Arbitrators, Donna C. Kline's Application for Decree with respect to such Award of Arbitrators, and John M. O'Quinn's Opposition to Kline's Application for Decree. Donna C. Kline, John M O'Quinn, and Thomas J. Pearson was each represented by counsel at the Hearing. The Court considered such Motions and such Opposition, the pleadings and papers filed in this Cause, the law, and arguments of counsel. Some of such issues were re-argued and again considered by the Court on October 9, 1992, November 6, 1992, and December 18, 1992. The Court ruled as provided herein with respect to the disputes among Donna C. Kline, John M. O'Quinn, and Thomas J. Pearson, and then carried such rulings with the case pending the trial between Donna C. Kline and BankOne, N.A.

BE IT FURTHER REMEMBERED that the disputes as between Donna C. Kline and BankOne, N.A. were tried to this Court on commencing December 21, 1992. Donna C. Kline appeared personally and through her counsel. BankOne, N.A. appeared through its authorized representatives and through counsel. Donna C. Kline and BankOne, N.A. announced ready for trial and the case was tried to the Court on December 21, 22, 23 and 28, 1992. During such trial, the Court tried no disputes as among Donna C. Kline, Thomas J. Pearson, or John M. O'Quinn. As such, Thomas J. Pearson and John M. O'Quinn, and their counsel, were not allowed to participate in such trial. Thomas J. Pearson, who had appeared at counsel table, was excluded from the Courtroom as a potential witness. Counsel for John M. O'Quinn was required to sit in the gallery.

BE IT FURTHER REMEMBERED that as a result of such hearings, the Court's consideration of such Motions and such Opposition, the pleadings and papers filed in this Cause, the law, arguments of counsel, and the trial of this Cause before this Court, the Court ORDERS, ADJUDGES, and DECREES as follows:

1. The purported award of punitive damages against John M. O'Quinn by the Arbitrators must be set aside and voided because such award fails to conform either to the parties' arbitration agreement or the relief sought by Donna C. Kline in connection with her claims against John M. O'Quinn and because the Arbitrators exceeded the scope of their authority in attempting to award punitive damages against John M. O'Quinn. Accordingly, the Award of Arbitrators is corrected and modified to void and delete Paragraph 2 on Page 1 thereof which purported to require John M. O'Quinn to pay to Donna C. Kline the sum of Fifty Thousand Dollars in exemplary damages plus interest.

2. Because Thomas J. Pearson's Motion to modify the Arbitrator's Award to eliminate the award of punitive damages was not timely filed with this Court pursuant to the provisions of the Texas General Arbitration Act, such Motion is denied.

3. Because the Arbitrators exceeded their authority in attempting to provide that the sums specified therein shall be paid within thirty (30) days from the date of the Arbitrators' signature on the Award, the Award of Arbitrators is corrected and modified to delete the next to last paragraph on Page 2 thereof.

4. All other aspects of the Award of Arbitrators are confirmed in all respects.

5. As between Donna C. Kline and John M. O'Quinn, the net result of Paragraph 1 on Page 1 of the Award of Arbitrators and the first two unnumbered paragraphs on Page 2 of the Award of Arbitrators -- and the Judgment of this Court through confirmation of such portions of the Award -- is that Donna C. Kline have judgment from John M. O'Quinn and that John M. O'Quinn shall pay to Donna C. Kline the net sum of Three Hundred and Three Thousand and Eighty One Dollars and twenty eight cents ($303,081.28), which judgment

shall bear interest from the date hereof until paid at the rate of ten percent (10%) per annum.

6. As between Donna C. Kline and Thomas J. Pearson, the net result of Paragraphs 4 and 5 on Page 1 of the Award of Arbitrators -- and the Judgment of this Court through confirmation of such portions of the Award -- is that Donna C. Kline have judgment from Thomas J. Pearson and that Thomas J. Pearson shall pay to Donna C. Kline the net sum of One Hundred Fifty Six Thousand Three Hundred and Seven Dollars and nineteen cents ($156,307.19), which judgment shall bear interest from the date hereof until paid at the rate of ten percent (10%) per annum.

7. As between Thomas J. Pearson and John M. O'Quinn, pursuant to the second unnumbered paragraph on Page 2 of the Award of Arbitrators it is the Judgment of this Court, through confirmation of such portion of the Award, that John M. O'Quinn have judgment from Thomas J. Pearson and that Thomas J. Pearson shall pay to John M. O'Quinn the sum of Three Thousand One Hundred Nineteen Dollars and twenty four cents ($3,119.24), which judgment shall bear interest from the date hereof until paid at the rate of ten percent (10%) per annum.

8. Donna C. Kline is awarded the balance of One Thousand Two Hundred Sixty-One Dollars and twenty-three cents ($1,261.23) in Texas Commerce Bank Account No. 018-0070995, also known as the "Imprest Account."

9. Donna C. Kline is awarded the sum of Five Hundred Dollars ($500.00) in her client trust account.

10. Donna C. Kline shall pay to the American Arbitration Association the sum of One Hundred Fifty-Seven Dollars and sixteen cents ($157.16) for compensation still due the arbitrators and Thomas J. Pearson shall pay to the American Arbitration Association the sum of Seven Thousand

Four Hundred Fifty-Three and fifty-nine ($7,453.59) for compensation still due the arbitrators. Thomas J. Pearson shall also pay to the American Arbitration Association the sum of One Thousand Two Hundred Seventy-One Dollars and thirteen cents ($1,271.13) for that portion of its share of administrative fees and expenses still due the Association. John M. O'Quinn shall pay to the American Arbitration Association the sum of One Hundred Fifty Dollars and no cents ($150.00) for postponement fees still due to the Association.

11. Each party participating in the Arbitration Proceeding shall bear its own attorneys fees in connection with the Arbitration and the entry of this Judgment.

12. Following the trial of this Cause as between Donna C. Kline and BankOne, N.A., the court granted a directed verdict for Defendant; and the Court orders that Donna C. Kline takes nothing from BankOne, N.A.

13. All costs of Court in this Cause shall be taxed to the party incurring the same.

14. This Judgment is a Final Judgment and is in full resolution of all claims and counterclaims in issue in this Cause or which could have been placed in issue in this Cause as between Donna C. Kline, on the one hand, and John M. O'Quinn, Thomas J. Pearson, or BankOne, N.A., on the other hand. All relief on any claim or counterclaim in issue in this Cause or which could have been placed in issue in this Cause by and between Donna C. Kline, on the one hand, and John M. O'Quinn, Thomas J. Pearson, or BankOne, N.A., on the other hand, not expressly granted in this Final Judgment, is denied.

Signed at Houston, Texas, on this the 4th day of January, 1993.

/s/ Tony Lindsay
Tony Lindsay
Judge, 280th Judicial District

Approved:

Norman Riedmueller
Texas Bar No. 16904600
NORMAN RIEDMUELLER, P.C. & ASSOCIATES
12 Greenway Plaza, Suite 909
Houston, Texas 77046-1202
PHONE: 713-965-9900
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ATTORNEY FOR DONNA C. KLINE

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2715 First City Tower
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ATTORNEYS FOR JOHN M. O'QUINN

THOMAS J. PEARSON, Pro se

Cheryl E. Irvin
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IRVIN & CLARK
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440 Louisiana, Suite 2050
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PHONE: 713-225-1055
FAX: 713-225-1157

ATTORNEYS FOR BANKONE, N.A.

APPENDIX G

AMERICAN ARBITRATION ASSOCIATION

Commercial ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

Donna C. Kline
-and-
John M. O'Quinn & Thomas J. Pearson

CASE NUMBER: 70 194 0030 91 W

AWARD OF ARBITRATOR(S)

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the Arbitration Agreement entered into by the above-named parties, and dated 1988 and 1989 and having been duly sworn and having duly heard the proofs and allegations of the parties, AWARD, as follows:

1. JOHN M. O'QUINN shall pay to DONNA C. KLINE the sum of TWO HUNDRED FORTY-NINE THOUSAND THREE HUNDRED SIXTEEN DOLLARS AND TWO CENTS ($249,316.02), plus pre-award interest of FORTY-ONE THOUSAND FIVE HUNDRED FIFTY-TWO DOLLARS AND SIXTY-SEVEN CENTS ($41,552.67), plus post-award interest at the rate of ten percent (10%) per annum on the sum of TWO HUNDRED NINETY THOUSAND EIGHT HUNDRED SIXTY-EIGHT DOLLARS AND SIXTY-NINE ($290,868.69) commencing June 15, 1992.

See page 2 for continuation of the award in this matter

2. JOHN M. O'QUINN shall pay to DONNA C. KLINE the sum of FIFTY THOUSAND DOLLARS in exemplary damages, plus interest thereon at the rate of ten percent (10%) per annum commencing on June 15, 1992.

3. DONNA C. KLINE is awarded the balance of ONE THOUSAND TWO HUNDRED SIXTY-ONE DOLLARS AND TWENTY-THREE CENTS ($1,261.23) in Texas Commerce Bank Account No. 018-0070995, also known as the "Imprest Account."

4. THOMAS J. PEARSON shall pay to DONNA C. KLINE the sum of ONE HUNDRED FIVE THOUSAND FIVE HUNDRED TWENTY-THREE DOLLARS AND TWENTY CENTS ($105,523.20), plus pre-award interest of SEVENTEEN THOUSAND FIVE HUNDRED EIGHTY-SEVEN DOLLARS AND TWENTY CENTS ($17,587.20), plus post-award interest at the rate of ten percent (10%) per annum on the sum of ONE HUNDRED TWENTY-THREE THOUSAND ONE HUNDRED TEN DOLLARS AND FORTY CENTS ($123,110.40) commencing June 15, 1992.

5. THOMAS J. PEARSON shall pay to DONNA C. KLINE the sum of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00) in exemplary damages, plus interest thereon at the rate of ten percent (10%) per annum commencing June 15, 1992.

6. DONNA C. KLINE is awarded the sum of FIVE HUNDRED DOLLARS ($500.00) in her client trust account.

7. Each party shall bear its own attorneys fees and share equally in the fees and expenses of arbitration.

8. All relief not specifically granted is hereby denied.

The compensation and expenses of the arbitrators totaling TWENTY-TWO THOUSAND THREE HUNDRED SIXTY DOLLARS AND SEVENTY-FIVE CENTS ($22,360.75) shall be borne equally by the parties. Therefore, DONNA C. KLINE shall pay to JOHN M. O'QUINN the sum of ONE THOUSAND FORTY-SIX DOLLARS AND FORTY-TWO CENTS ($1,046.42). DONNA C. KLINE shall pay to the American Arbitration Association the sum of ONE HUNDRED FIFTY-SEVEN DOLLARS AND SIXTEEN CENTS ($157.16) for compensation still due the arbitrators and THOMAS J. PEARSON shall pay to the American Arbitration Association the sum of SEVEN THOUSAND FOUR HUNDRED FIFTY-THREE AND FIFTY-NINE ($7,453.59) for compensation still due the arbitrators.

The administrative fees and expenses of the American Arbitration Association totaling THIRTEEN THOUSAND ONE HUNDRED SEVENTY-ONE DOLLARS AND THIRTEEN CENTS ($13,171.13) shall be borne equally by the parties, and postponement fees shall be borne by the party requesting same. Therefore, DONNA C. KLINE shall pay to JOHN M. O'QUINN the sum of TWO THOUSAND EIGHT HUNDRED FORTY DOLLARS AND THIRTY-EIGHT CENTS ($2,840.38) and THOMAS J. PEARSON shall pay to JOHN M. O'QUINN the sum of THREE THOUSAND ONE HUNDRED NINETEEN DOLLARS AND TWENTY-FOUR CENTS ($3,119.24) for that portion of their share of administrative fees and expenses previously advanced by JOHN M. O'QUINN to the Association. THOMAS J. PEARSON shall pay to the American Arbitration Association the sum of ONE THOUSAND TWO HUNDRED SEVENTY-ONE DOLLARS AND THIRTEEN CENTS ($1,271.13) for that portion of its share of administrative fees and expenses still due

the Association. JOHN M. O'QUINN shall pay to the American Arbitration Association the sum of ONE HUNDRED FIFTY DOLLARS AND NO CENTS ($150.00) for postponement fees still due to the Association.

The above sums shall be paid within thirty (30) days from the date of the arbitrators' signature on this Award.

This Award is in full settlement of all claims and counterclaims submitted to this arbitration.

SIGNED: /s/ Dermot Rigg DATED: June 19, 1992
Dermot Rigg - Chairman

SIGNED: /s/ James B. Gambrell DATED: June 22, 1992
James B. Gambrell - Arbitrator

SIGNED: /s/ Wendell S. Loomis DATED: June 18, 1992
Wendell S. Loomis - Arbitrator

State of

} SS:

County of

On this day of , 19 , before me personally came and appeared , to me known and to me known to be the individual(s) described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

APPENDIX H

AMERICAN ARBITRATION ASSOCIATION

Commercial ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

Donna C. Kline
-and-
John M. O'Quinn & Thomas J. Pearson

CASE NUMBER: 70 194 0030 91 W

AWARD OF ARBITRATOR(S)

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the Arbitration Agreement entered into by the above-named parties, and dated 1988 and 1989, and having been duly sworn and having duly heard the proofs and allegations of the parties, and previously having rendered an Award dated June 22, 1992, and Steven R. Borgman and J. Clark Martin on behalf of John M. O'Quinn having requested a modification by pleadings dated July 13, 1992 and August 21, 1992, respectively, and Norman Riedmueller on behalf of Donna C. Kline having responded by pleadings dated July 14, 1992 and August 5, 1992, and August 27, 1992, do hereby, DECIDE, as follows:

The Motion to Partially Modify and Vacate Arbitration Award is hereby DENIED.

This Award is in full settlement of all claims and counterclaims submitted to this arbitration.

In all other respects, our Award dated June 22, 1992 (the date of the final arbitrator's signature on such) is reaffirmed and remains in full force and effect.

SIGNED: /s/ Dermot Rigg DATED: 8/31/92
Dermot Rigg, Esq. - Chairman

SIGNED: /s/ James B. Gambrell DATED: 9/3/92
James B. Gambrell, Esq. - Arbitrator

SIGNED: /s/ Wendell S. Loomis DATED: 9/1/92
Wendell S. Loomis, Esq. - Arbitrator

STATE OF

} SS:

COUNTY OF

On this day of , 19 , before me personally came and appeared

to me known and to me known to be the individual(s) described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

APPENDIX I

AMERICAN ARBITRATION ASSOCIATION

MEDIATION Please consult the Commercial Mediation Rules regarding mediation procedures. If you want the AAA to contact the other party and attempt to arrange a mediation, please check this box. ☐

COMMERCIAL ARBITRATION RULES
DEMAND FOR ARBITRATION

DATE: March 8, 1991

TO: Name John M. O'Quinn (O'Quinn) Thomas J. Pearson (Pearson)
(of the party upon whom the demand is made)

Address 440 Louisiana, Ste 2300 3900 Two Houston Center
City and State Houston, TX 77002 ZIP Houston, TX 77010
Telephone (713) (O'Quinn) 223-1000; (Pearson) 951-2386
Fax (O'Quinn) 222-6903; (Pearson) 759-1325

Name of Representative None now known (if known)
Representative's Address _____
City and State _____ ZIP Code _____

Telephone ( ) _____ Fax _____

The named claimant, a party to an arbitration agreement contained in a written contract, dated 1988 and 1989, providing for arbitration under the Commercial Arbitration Rules, hereby demands arbitration thereunder.

(Attach the arbitration clause or quote it hereunder.)
See Attachments I and II.

NATURE OF DISPUTE: Disagreement among attorneys over contingent fee recoveries.

CLAIM OR RELIEF SOUGHT (amount, if any): Unable to be determined without discovery from Respondents.

TYPE OF BUSINESS: Claimant Attorney Respond s Attorneys
HEARING LOCALE REQUESTED: Houston, TX
(City and State)

You are hereby notified that copies of our arbitration agreement and of this demand are being filed with the American Arbitration Association at its Houston, TX office, with the request that it commence the administration of the arbitration. Under the rules, you may file an answering statement after notice from the administrator.

Signed */s/* Norman Riedmueller Title Attorney
(may be signed by a representative)

Name of Claimant	Donna C. Kline
Address (to be used in connection with this case)	
City and State	Houston, TX ZIP Code 77002
Telephone	(713) 529-5922 Fax Same
Name of Representative	Norman Riedmueller
Representative's Address	12 Greenway Plaza, Suite 909
City and State	Houston, TX ZIP Code 77046
Telephone	(713) 965-9900 Fax (713) 965-9902

To institute proceedings, please send three copies of this demand with the administrative fee, as provided for in the rules, to the AAA. Send the original demand to the respondent.

8. BINDING ARBITRATION - In the event that a dispute arises among the Parties hereto, the Parties covenant to endeavor in good faith to resolve said dispute amicably. In the event that a dispute arises among Parties that cannot be amicably resolved or, Parties have elected to terminate this Agreement and are unable to reach an agreement to that end, said dispute shall be determined by arbitration conducted in the City of Houston, State of Texas, in accordance with the rules then in force of the American Arbitration Association, and judgment upon the award rendered may be entered in any court having jurisdiction thereof. The expenses of arbitration shall be shared equally among or between the arbitrating parties but each party shall be responsible for the fees of its own counsel. Said arbitration shall take place within thirty (30) days of request by any party, unless any party to the arbitration shall be in trial at that time in which case it shall take place within thirty (30) days after such trial is concluded.

ATTACHMENT I

7. Binding Arbitration - In the event that a dispute arises among the Parties hereto, the Parties covenant to endeavor in good faith to resolve said dispute amicably. In the event that a dispute arises among Parties that cannot be amicably resolved or, Parties have elected to terminate this Agreement and are unable to reach an agreement to that end, said dispute shall be determined by arbitration conducted in the City of Houston, State of Texas, in accordance with the rules then in force of the American Arbitration Association, and judgment upon the award rendered may be entered in any court having jurisdiction thereof. The expenses of arbitration shall be shared equally among or between the arbitrating parties but each party shall be responsible for the fees of its own counsel. Said arbitration shall take place within thirty (30) days of request by any party, unless any party to the arbitration shall be in trial at that time in which case it shall take place within thirty (30) days after such trial is concluded.

ATTACHMENT II

APPENDIX J

NORMAN RIEDMUELLER, P.C. & ASSOCIATES
Attorneys at Law
12 Greenway Plaza, Suite 909
Houston, TX 77046
---
(713) 965-9900
Telecopier: (713) 965-9902

May 28, 1991

VIA HAND DELIVERY

Ms. Tamme S. Wilkes, Administrator
American Arbitration Association
1317 First City Tower
1001 Fannin
Houston, Texas 77002-6701

Re: 70 194 0030 91 W
Donna C. Kline v. John M. O'Quinn and Thomas J. Pearson
Houston, Texas

Dear Ms. Wilkes:

Enclosed with this letter you should find our "List For Selection of Arbitrator" with some names stricken and the rest numbered in order of our preference. Also enclosed you should find a copy of our original court pleading. I am enclosing this pleading because it states Ms. Kline's position on the matters in controversy more clearly than the papers previously submitted to you. Please make the pleading available to the arbitrators when chosen.

As detailed in the enclosed pleading, Ms. Kline believes she is entitled to an accounting with regard to the collection and distribution of the proceeds of settlement of various lawsuits. Presently, Ms. Kline is completely uninformed as to the amounts received in settlement of some of the suits and has only rumor to rely upon with regard to some of the others.

Please provide this letter to the arbitrators so that they will understand the problem we are having. It is impossible for Ms. Kline to state the amount of her claim because she has been shouldered out with regard to the fees. We can think of two ways to address this situation:

kline/wilkes.ltr

Ms. Tamme S. Wilkes
May 28, 1991
Page 2

(a) the arbitration panel can order (or provide for discovery leading to) an accounting of the money; or

(b) the arbitration can proceed in stages, with the first stage being a determination of Ms. Kline's right to an accounting and the second stage being the determination of Ms. Kline's right to a share of the money.

Ms. Kline has made repeated requests to the adverse parties to provide her with information regarding the settlements in the underlying lawsuits. These have been ignored in the case of Mr. O'Quinn. They have received lip service only in the case of Mr. Pearson.

Until the facts regarding the settlements are shared with Ms. Kline, she is unable to state the full amount of her claim

and manifestly unable to proceed to a final hearing on the determination of her rights.

With regard to scheduling, please be advised that Ms. Kline will be out of the country from June 12, 1991, until July 1, 1991. I will be out of the state from June 19, 1991, to July 1, 1991.

Please call these matters to the attention of the arbitrators at your first convenience.

Yours very truly,

/s/ Norman Riedmueller

Norman Riedmueller

NR/mr
Enclosure

NO. 91-009787

Donna C. Kline Plaintiff,	§	In the District Court of
v.	§	Harris County, Texas
John M. O'Quinn, Thomas J. Pearson, and Bank One, Defendants,	§	280th Judicial District

PLAINTIFF'S ORIGINAL PETITION

COMES NOW Plaintiff Donna C. Kline ("MS. KLINE") complaining of Defendants John M. O'Quinn ("MR. O'QUINN"), Thomas J. Pearson ("MR. PEARSON") and Bank One, formerly known as MBank Houston, National Association (the "BANK"), and would respectfully show:

NATURE OF ACTION

1. This is basically a suit to enforce agreements among attorneys and a bank regarding the division of contingent fee recoveries in a variety of lawsuits. MS. KLINE has been and is being short changed or left out altogether as certain of the fees are actually recovered.

PARTIES

2. Plaintiff MS. KLINE is an individual resident of this County and State.

3. Defendants MR. O'QUINN and MR. PEARSON are individual residents of this County and State who may be served with original process herein at their respective offices as shown below:

Mr. John M. O'Quinn
O'Quinn, Kerensky & McAninch
440 Louisiana, Suite 2300
Houston, Texas 77002

Mr. Thomas J.Pearson
c/o Miller, Bristow & Brown
3900 Two Houston Center
Houston, Texas 77010

4. Defendant Bank One is a national banking association which may be served with original process herein by serving any of its officers at 910 Travis, Houston, TX 77002.

JURISDICTION AND VENUE

5. This is a case within this Court's general jurisdiction. The parties reside within this County and Plaintiff's claims arose at least in part within this County.

BACKGROUND FACTS

6. In 1988, MS. KLINE, MR. O'QUINN and MR. PEARSON made a written Agreement regarding work they would do on certain specified claims and how the fees, if any, recovered thereby would be divided. A copy of that Agreement ("the First Attorneys Agreement") is attached to this Petition as Exhibit A hereto and fully incorporated herein by this reference.

7. While the First Attorneys Agreement was in effect, MR PEARSON became indebted to MS. KLINE in at least the amount of Sixteen Thousand Five Hundred Dollars ($16,500) due to expenses, advances and the like. MR. PEARSON agreed to repay this sum at least.

8. In 1989, for various reasons, the First Attorneys Agreement was superseded by two new written Agreements. One of these two new Agreements was among only MS. KLINE, MR. O'QUINN and MR. PEARSON ("the Second Attorneys Agreement"). A copy of it is attached hereto as Exhibit B and fully incorporated herein by this reference. The other of the two agreements was among MS. KLINE, MR.

O'QUINN, MR. PEARSON and the BANK ("the Bank Agreement"). A copy of it is attached hereto as Exhibit C and fully incorporated herein by this reference. It affirmed MR. PEARSON's prior debt to MS. KLINE of at least $16,500.

9. The Second Attorneys Agreement and the Bank Agreement (together, "the 1989 Agreements") are binding on the parties thereto and enforceable by MS. KLINE according to their terms. Alternatively, if the 1989 Agreements are for any reason not enforceable by MS. KLINE, the First Attorneys Agreement is binding on the parties and enforceable by MS. KLINE according to its terms. Further alternatively, if all the referenced Agreements are for any reason not enforceable by MS. KLINE, she is entitled to recover in *quantum meruit*.

10. The parties to the referenced Agreements were in a special relationship with [each] other. By virtue of such relationship and by virtue of the Agreements themselves, the parties were obligated to act in good faith toward one another and to deal fairly with one another.

11. All conditions precedent to the relief sought herein have occurred or been performed.

THE LIBERTY WASTE CASES

12. The "Liberty Waste" cases referred to in the parties' Agreements have been the subject of certain settlements. The first such settlement was achieved in early 1989. MR. O'QUINN breached his Agreements with MS. KLINE and his good faith duties to MS. KLINE by:

(a) failing to account to MS. KLINE for the division and distribution of the settlement proceeds taken in trust by him;

(b) failing to properly apply such settlement proceeds in reduction of debt owed to MR. O'QUINN;

(c) interfering with MS. KLINE's lien on MR. PEARSON's share of such settlement proceeds;

(d) attempting to induce MR. PEARSON to agree to accept a lesser share of the settlement proceeds than previously agreed upon; and

(e) disbursing settlement proceeds without the approval of MS. KLINE.

13. A second "Liberty Waste" settlement was achieved in the Spring of 1990. If MR. O'QUINN had credited to the obligations of MS. KLINE to him her share of the proceeds of the proceeds of the first and second Liberty Waste settlements, her obligations to him would have been fully satisfied. In breach of his Agreements with MS. KLINE and his good faith duties, MR. O'QUINN did the following:

(a) he failed to account to MS. KLINE for the division and distribution of the settlement proceeds taken in trust by him;

(b) he failed to properly apply such proceeds to extinguish debt owed to him;

(c) he interfered with MS. KLINE's lien on MR. PEARSON's share of such settlement proceeds;

(d) he failed to pay to MS. KLINE the balance of the settlement proceeds owed to her;

(e) he disbursed settlement proceeds without the approval of MS. KLINE.

14. A third "Liberty Waste" settlement was achieved in the Summer of 1990. In breach of his agreements with MS. KLINE and his good faith duties, MR. O'QUINN did the following:

(a) he failed to account to MS. KLINE for the division and distribution of the settlement proceeds taken in trust by him;

(b) he failed to pay to MS. KLINE her share of such proceeds;

(c) he disbursed settlement proceeds without the approval of MS. KLINE.

15. MS. KLINE is informed and believes that a fourth settlement and a fifth settlement were achieved in the "Liberty Waste" cases. By the time these occurred, relations between the parties were strained to the point where little or no information was being shared with MS. KLINE. If, as MS. KLINE believes, millions of dollars have been recovered by further Liberty Waste settlements, then MR. O'QUINN, MR. PEARSON or both have breached their Agreements with MS. KLINE and their good faith duties by:

(a) failing to account to MS. KLINE for the division and distribution of the settlement proceeds;

(b) failing to pay to MS. KLINE her share of such proceeds;

(c) disbursing settlement proceeds without the approval of MS. KLINE.

THE HELM CASE

16. After the First Attorneys Agreement was made and before the 1989 Agreements were made, a settlement was achieved of part of the "Helm" case (one of the "asbestos cases" referred to in the parties' Agreements). These proceeds were deposited in MR. PEARSON's client trust account. He has never transferred these proceeds to MR. O'QUINN's client trust account, nor accounted to MS. KLINE for her share of the recovery, nor applied it to her debt to him, nor paid her any of it. These failures were in breach of MR. PEARSON's contract and good faith duties.

17. MS. KLINE is entitled to be kept informed of the progress of the balance of the "Helm" case, but has not been. If there has been any further recover in the case, she has been deprived of her rights in that regard as well.

THE COOK AND MAYFIELD CASES

18. The "Cook" and "Mayfield" cases are two other "asbestos" cases covered by the parties' Agreements. After the First Attorneys Agreement was made and before the 1989 Agreements were made, there may have been a recovery achieved in these two cases. MS. KLINE has not been kept informed in this regard. After the 1989 Agreements were made, MS. KLINE came into possession of Five Hundred Dollars ($500) which she is holding in her client trust account with respect to these two asbestos cases. If any other party has achieved any settlement or other recovery in the "Cook" or "Mayfield" cases, MS. KLINE is entitled to an accounting of the division and distribution thereof and to her share thereof.

THE GOINGS CASE

19. In November 1990, the "Goings" case referred to in the parties' Agreements was settled. Apparently, MR. PEARSON exercised control over the settlement proceeds. He paid some money to MS. KLINE to reimburse expenses she had incurred. In violation of his contract and good faith duties, MR. PEARSON:

(a) has failed to fully account to MS. KLINE for the division and distribution of the settlement proceeds; and

(b) may have failed to pay to MS. KLINE her share thereof.

THE BANK'S ROLE

20. MS. KLINE presently has no reason to believe that the BANK has been actively responsible for the harm she has suffered. However, because the BANK is a party to the Bank Agreement and has a legal interest in the outcome of these matters, the BANK has been named a party to this case. MS. KLINE further believes that the BANK has acquiesced in distributions in derogation of her rights.

CAUSES OF ACTION

21. By virtue of the foregoing, MR. O'QUINN and MR. PEARSON are in breach of their contractual obligations to MS. KLINE. these breaches have caused her monetary loss in an amount which she is presently unable to state due to the withholding of information from her.

22. Further by virtue of the foregoing, MR. O'QUINN and MR. PEARSON have breached their tort duty of acting in good faith toward MS. KLINE and of dealing fairly with her.

23. MR. O'QUINN assumed the duties of a fiduciary by agreeing to take settlement proceeds into a client trust account and by then doing so, he breached his fiduciary duties to MS. KLINE by all of his conduct described above regarding the handling of settlement proceeds.

24. MR. PEARSON assumed the duties of a fiduciary by taking settlement proceeds into a client trust account and by later orally agreeing to hold such proceeds therein. He breached his fiduciary duties to MS. KLINE by his conduct in the handling of such proceeds.

25. MR. PEARSON has not paid the $16,500 he agreed he owes her.

26. MS. KLINE is entitled to a declaratory judgment in her favor resolving all outstanding disputes amongst the parties.

ARBITRATION

27. The First Attorneys Agreement and the Second Attorneys Agreement contain provisions requiring binding arbitration of disputes arising thereunder. MS. KLINE has invoked and again invokes such provisions as they pertain to MR. O'QUINN and MR. PEARSON.

ATTORNEYS FEES

28. MS. KLINE has been required to retain attorneys to represent her in enforcing her contract rights and in securing the declaratory relief to which she is entitled. Both at law and by virtue of express provisions in the written Agreements made the subject of this case, MS. KLINE is entitled to recover reasonable and necessary attorneys fees.

PRAYER

WHEREFORE, Plaintiff DONNA C. KLINE, prays that the Defendants be cited to appear and answer herein; that the Court order arbitration of the disputes between Plaintiff and Defendants JOHN M. O'QUINN and THOMAS J. PEARSON; that, with or without regard to any arbitration award, she receive her actual damages with pre-judgment interest, a reasonable and necessary attorneys fee award, post-judgment interest, a declaration of the relative rights and duties of the parties and such other and further relief, whether at law or in equity, whether general or special, to which she may show herself to be entitled. Plaintiff prays for general relief.

Respectfully submitted,

NORMAN RIEDMUELLER, P.C. &
ASSOCIATES

By: /s/ Norman Riedmueller (ues)
Norman Riedmueller
Texas Bar No. 16904600
12 Greenway Plaza, Suite 909
Houston, Texas 77046
(713) 965-9900
(713) 965-9902 - Telecopier

ATTORNEYS FOR PLAINTIFF
DONNA C. KLINE

APPENDIX K

NO. 14-93-00187-CV

DONNA C. KLINE,
Appellant,

vs.

JOHN M. O'QUINN
THOMAS J. PEARSON, and
BANK ONE, TEXAS, N.A.,
Appellees

IN THE COURT OF APPEALS FOR THE
FOURTEENTH DISTRICT OF TEXAS

BRIEF OF APPELLEE JOHN M. O'QUINN

J. Clark Martin
Texas Bar No. 13090000
Steven R. Borgman
Texas Bar No. 02670300
VINSON & ELKINS L.L.P.
Attorneys At Law
2715 First City Tower
1001 Fannin
Houston, Texas 77002-6760

TO THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS:

COMES NOW Appellee John M. O'Quinn ("O'Quinn") and respectfully files this his Brief of Appellee. For the reasons set forth below, O'Quinn prays that this Court **affirm** the Judgment granted below.

NAMES OF ALL PARTIES

Appellant:	Donna C. Kline
Appellant's Counsel:	Norman Riedmueller Michael Pullara
Appellee:	John M. O'Quinn
Appellee's Counsel:	J. Clark Martin Steven R. Borgman Vinson & Elkins L.L.P.
Appellee:	Thomas J. Pearson
Appellee's Counsel:	Thomas J. Pearson & Associates Pro se
Appellee:	Bank One, Texas, N.A.
Appellee's Counsel:	Cheryl E. Irvin Irvin, Clark & Burnett

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MR. O'QUINN'S COUNTER-POINTS OF ERROR:

1. **THE TRIAL COURT PROPERLY MODIFIED THE AWARD TO ELIMINATE THE PUNITIVE DAMAGES AWARDED AGAINST MR. O'QUINN**

2. **THE TRIAL COURT PROPERLY REFUSED TO AWARD MS. KLINE ATTORNEYS' FEES INCURRED IN CONNECTION WITH EFFORTS TO CONFIRM OR ENFORCE THE AWARD**

3. **THE TRIAL COURT PROPERLY REFUSED TO ALLOW MS. KLINE TO LITIGATE THE SINGLE ISSUE OF PUNITIVE DAMAGES AS TO MR. O'QUINN**

SUMMARY OF THE ISSUES BETWEEN MS. KLINE AND MR. O'QUINN:

Insofar as this appeal by Ms. Donna Kline pertains to Mr. O'Quinn, it presents three primary issues.

1. First, there is the issue of whether Arbitrators functioning pursuant to the Texas General Arbitration Act should, in accordance with constitutional principles or as a matter of public policy, be prohibited from awarding punitive damages; and/or, if Arbitrators functioning pursuant to the Texas General Arbitration Act are not prohibited constitutionally or as a matter of public policy from awarding punitive damages, whether the Arbitrators in this case exceeded their Authority by attempting to award punitive damages against Mr. O'Quinn when the issue of punitive damages was not submitted to arbitration; and/or, if Arbitrators functioning pursuant to the Texas General Arbitration Act are not prohibited constitutionally or as a matter of public policy from awarding punitive damages and if it is concluded that the issue of punitive damages against Mr. O'Quinn was submitted to arbitration, whether the Arbitrators in this case exceeded their Authority by attempting to award punitive damages against Mr. O'Quinn when Texas law does not allow the award of punitive damages in connection with Ms. Kline's claim for economic losses resulting from breach of contract. [Responsive to Ms. Kline's Point of Error No. 1]

2. Second, even though the Arbitrators' Award provided that each party shall bear his or her own attorneys fees, Ms. Kline claimed that she was entitled to a further award against Mr. O'Quinn (and also against Mr. Pearson) for attorney's fees incurred in connection with getting the *Final Judgment* signed by the Trial Court confirming the Arbitrators' Award. Ms. Kline made this claim even though it was she who prolonged the process by refusing to accept the proposed Judgment that Mr. O'Quinn agreed could be entered by the Court and even though the *Final Judgment* ultimately entered by the

Court was not favorable to Ms. Kline on the then disputed issues of punitive damages and post-Award attorney's fees. The Trial Court denied Ms. Kline's request for such post-Award attorney's fees. Ms. Kline now appeals this aspect of the Trial Court's *Final Judgment*. [Responsive to Ms. Kline's Point of Error No. 2]

3. Third, Ms. Kline argued to the Trial Court that even though Ms. Kline had obtained an Award in the Arbitration proceeding in the total amount of the economic losses she had been seeking, she should be entitled to go to trial against Bank One to obtain judgment against Bank One for the same amount of economic losses. Ms. Kline also argued that she should be allowed to a separate trial against Mr. O'Quinn for punitive damages alone and that she should have the right to a separate trial on post-Award attorneys fees. The Trial Court held that Ms. Kline was not entitled to either punitive damages from Mr. O'Quinn or post-Award attorneys fees from Mr. O'Quinn and Mr. Pearson. The Trial Court held that Ms. Kline could proceed to trial against Bank One, but that nothing would be tried as against Mr. O'Quinn or Mr. Pearson. Ms. Kline's case against Bank One went to trial on December 21, 1992. The case was tried to the Court. The Court tried no disputes as among Ms. Kline and Mr. O'Quinn. Mr. O'Quinn and undersigned counsel were not allowed to participate in such trial. Mr. O'Quinn, who was in trial in another court at the time, was excluded from the courtroom as a potential witness. Undersigned counsel for Mr. O'Quinn was required to sit in the gallery. At the conclusion of Ms. Kline's case, the Trial Court granted a directed verdict in favor of Bank One. Ms. Kline now appeals the Trial Court's decision to direct a verdict in favor of Bank One. Undersigned counsel represents only Mr. O'Quinn. Mr. Pearson represents himself *pro se*. Bank One has its own counsel. Although this Appellee's Brief discusses Ms. Kline's theories concerning her right to a trial against Mr. O'Quinn and the *res judicata* affect of the Arbitration proceeding with respect to Mr. O'Quinn, insofar as Ms. Kline's Point of Error No. 3 affects Bank One, undersigned

counsel leaves that issue to Bank One. [Responsive to Ms. Kline's Point of Error No. 3]

MR. O'QUINN'S RULE 74(f) OBJECTION TO MS. KLINE'S STATEMENT OF THE FACTS:

Pursuant to Rule 74(f) of the Texas Rules of Appellate Procedure, Mr. O'Quinn objects to Ms. Kline's Statement of the Facts and other representations of facts in the Brief of Appellant and submits the following Statement of the Facts.

STATEMENT OF THE FACTS:

Insofar as this appeal involves issues between Ms. Kline and Mr. O'Quinn, this appeal arises out the arbitration of a contract dispute among lawyers over the allocation of contingent fees from various cases.

a. The disputes between Ms. Kline and Mr. O'Quinn:

In the mid-80's, Mr. O'Quinn entered into an agreement with Mr. Don Maierson, an attorney, with respect to certain "toxic tort" cases, often referred to as the ***Liberty Waste*** cases. Under this agreement, Mr. O'Quinn was to receive 45% of any fees recovered in the ***Liberty Waste*** cases, with Mr. Maierson to use the other 55% to pay himself and the other attorneys working on the case. [SOF 582-584; P. Exhs. 3 & 4]

In early 1988, Ms. Kline and Mr. Pearson were working together on various cases, representing various clients on a contingent fee basis. [SOF 74-78 and 83-92] In that timeframe, Mr. Maierson entered into an arrangement separately with each of Ms. Kline and Mr. Pearson regarding Ms. Kline and Mr. Pearson assisting Mr. Maierson with the ***Liberty Waste*** cases. [SOF 586-587] They were to be paid out of Mr. Maierson's share of the attorneys fees ultimately recovered in connection with those cases.

Because Ms. Kline and Mr. Pearson did not have adequate resources to finance their own cases, they sought help from Mr.

O'Quinn. [SOF 587-589] On March 1, 1988, Ms. Kline and Messrs. O'Quinn and Pearson entered into an agreement by which Mr. O'Quinn would fund and assist in certain cases. [Tr. 11-20] In this agreement, Ms. Kline, Mr. Pearson, and Mr. O'Quinn restated their understanding of the apportionment of fees in the ***Liberty Waste*** cases. In addition, Mr. Pearson and Ms. Kline agreed to pay Mr. O'Quinn a specified share of any recovery they received in other cases, such as the ***Lux, Cook, Helm,*** and ***Goings*** cases. [Tr. 11-20] Pursuant to this March 1, 1988 agreement, Mr. O'Quinn advanced both Mr. Pearson and Ms. Kline substantial sums. Moreover, Mr. O'Quinn funded an account for Ms. Kline and Mr. Pearson to use to pay expenses incurred in the cases covered by the March 1, 1988 Agreement. [SOF 105-106, 587-589, P. Exh. 5]

In connection with the March 1, 1988 agreement, Mr. Pearson concealed from Mr. O'Quinn that Bank One's predecessor, MBank, had obtained a Judgment against Mr. Pearson that affected the attorney's fees that might be forthcoming in the ***Lux, Cook, Helm,*** and ***Goings*** cases. [SOF 576-578] When Mr. O'Quinn learned that MBank was a judgment creditor of Mr. Pearson, Ms. Kline, Mr. O'Quinn, and Mr. Pearson entered into an agreement with MBank to allocate Mr. Pearson's share of any attorney's fees from the cases covered by the March 1, 1988 Agreement. [SOF 576-578, Tr. 39-45, P. Exh. 8] At the same time, Ms. Kline, Mr. O'Quinn, and Mr. Pearson entered into a second agreement dated January 20, 1989 [P. Exh. 7] detailing their understanding of how the fees were to be allocated (the "Agreement"). [Tr. 21-38]

Mr. Maierson, Mr. O'Quinn, Ms. Kline and Mr. Pearson were ultimately successful in their representation of their clients in these cases. As a result of various settlements in the cases covered by the above agreements, sums were received for the clients and attorney's fees were recovered. Mr. Pearson recovered approximately $1.4 million in fees from the ***Goings*** case, but failed to pay Mr. O'Quinn the portion due him under the Agreement. [SOF 603] Ms. Kline received fees from the

Lux case and failed to pay Mr. O'Quinn the portion due him under the Agreement. [SOF 185-189, 605-606] When there were settlements in the ***Liberty Waste*** cases, Mr. Maierson refused to pay Ms. Kline because Ms. Kline had failed to carry out her responsibilities with respect to the cases. Ms. Kline asked Mr. O'Quinn to get involved and try to persuade Mr. Maierson to pay Ms. Kline. [SOF 590-592, D. Exh. 75] When Mr. Maierson still refused to pay Ms. Kline, she asked Mr. O'Quinn to pay her from his own share of the ***Liberty Waste*** fees, something Mr. O'Quinn had never agreed to do. [SOF 614-615]

In early 1991, after Mr. O'Quinn refused to comply with her demands for more money, Ms. Kline filed suit against Mr. O'Quinn, Mr. Pearson, and MBank (now Bank One, Texas, N.A.), claiming that they owed her additional attorney's fees from the settlements of certain lawsuits. [Tr. 2] As detailed in Ms. Kline's *Original Petition*, she sued Mr. O'Quinn and Mr. Pearson. Bank One was named in Ms. Kline's lawsuit, but no claim was made against Bank One. [Tr. 8] Ms. Kline alleged that Mr. O'Quinn and Mr. Pearson were in breach of their contractual obligations regarding the allocation of attorney's fees. Ms. Kline sought to recover the economic losses she claimed she sustained as a result of the breach of the Agreement by Mr. O'Quinn and Mr. Pearson. Although her lawsuit was to recover monies that she claimed she was owed under the Agreement, Ms. Kline also alleged that Mr. O'Quinn and Mr. Pearson breached an alleged tort duty of good faith and fair dealing and had assumed the duties of fiduciaries and had breached a fiduciary duty. Mr. O'Quinn answered and denied all wrongdoing. [Tr. 48]

b. The arbitration proceeding:

After filing suit, on March 8, 1991 Ms. Kline then filed a demand for arbitration with the American Arbitration Association. [P. Exh. 76] Ms. Kline's demand for arbitration described the dispute as a "disagreement among attorneys over

contingent fee recoveries." [P. Exh. 76] Ms. Kline also submitted her Original Petition to the AAA, together with an explanatory letter, which noted that the Original Petition "states Ms. Kline's position on the matters and controversy more clearly than the papers previously submitted" to the AAA. [Supp. Tr. 30-31] Neither Ms. Kline's demand for arbitration nor her Original Petition made any request for an award of punitive damages. [Tr. 2-10, Supp. Tr. 27-31] In her prayer, Ms. Kline requested only actual damages, attorney's fees, pre-judgment and post-judgment interest, and a declaration of the rights and duties of the parties with respect to each other. [Tr. 8-10] Mr. O'Quinn presented his claims for monies owed to him by Mr. Pearson and Ms. Kline. [Tr. 300-304]

Because the agreements among Ms. Kline, Mr. O'Quinn, and Mr. Pearson provided for arbitration, these three parties proceeded to arbitration before the AAA in Arbitration No. 70 194 0030 91 W. The arbitration hearing was held in May 1992. There was no transcript or other record maintained on the Arbitration Proceeding. On June 23, 1992, the arbitrators issued their "Award of Arbitrators." [Tr. 81] The Arbitrators awarded Ms. Kline all of the compensatory losses she had claimed against Mr. O'Quinn, plus pre-Award and post-Award interest. Even though not pled for by Ms. Kline, the Arbitrators stated that Mr. O'Quinn was to pay Ms. Kline $50,000 in exemplary damages. The Arbitrators stated that each party shall bear its own attorneys fees and share equally in the fees and expenses of arbitration. The Arbitrators held that "all relief not specifically granted in the Award is hereby denied" [Tr. 81] and that the "Award is in full settlement of all claims and counterclaims submitted to this Arbitration" [Tr. 82].

c. The post-Award events as between Ms. Kline and Mr. O'Quinn:

Undersigned counsel began representing Mr. O'Quinn after the Arbitrators entered their Award. Because the

Arbitrators' Award improperly purported to assess punitive damages against him, Mr. O'Quinn timely sought review of the Award by the Arbitrators pursuant to Articles 232, 237 and 238 of the Texas General Arbitration Act. [Tr. 83] The AAA initially refused to even consider the Motion. The AAA took the position that, irrespective of the Texas General Arbitration Act, an AAA Award may not be modified or vacated. The AAA stated that they would not even refer Mr. O'Quinn's Motion on the Arbitrators for their consideration, unless Ms. Kline agreed. Ms. Kline filed a Response opposing what undersigned counsel had to say.[1/] Undersigned counsel filed a Reply [P. Exh. 73] to Ms. Kline's Response pointing out to the AAA that its own Guide to Commercial Arbitration requires that the AAA follow the law and that the Texas General Arbitration Act -- which is the law -- provides for the filing of an application for the modification of an Award. The AAA ignored Mr. O'Quinn's Reply. It was only after I

1/ Ms. Kline's Response to Mr. O'Quinn's Motion is found at SOF P. Exh. 72. Ms. Kline opposed having the Arbitrators even consider Mr. O'Quinn's Motion. Ms. Kline's Response also references letters that Ms. Kline's counsel had previously sent to the AAA opposing the Arbitrators' consideration of Mr. O'Quinn's Motion.

The entire tenor and attitude of Ms. Kline's Response is important to this Court's review of the issues presented in this Appeal. This is an instrument filed by Ms. Kline with the AAA for the purpose of trying to avoid the legal issues by ridicule. Undersigned counsel had never met or even spoken with Ms. Kline or her counsel. Yet Ms. Kline engaged in the same type of personal attacks that had been directed at Mr. O'Quinn throughout the entire Arbitration proceeding and were directed at Mr. O'Quinn relentlessly in the subsequent proceedings before the Trial Court.

demanded that the issue be decided by the AAA's head office in New York that the AAA relented and forwarded Mr. O'Quinn's motion to the three Arbitrators. Given the AAA's actions, it was not surprising that the Arbitrators summarily denied Mr. O'Quinn's Motion. [Tr. 96] Indeed, as Ms. Kline's Response urged, the Arbitrators may not have even considered Mr. O'Quinn's Motion at all. [P. Exh 72, p. 3]

Mr. O'Quinn then filed with the Trial Court his Motion to Vacate, or, Alternatively, Modify and Correct the Award. [Tr. 58-72][2/] About the same time, Ms. Kline filed a motion, styled an Application for Decree, seeking to confirm the Award. [Tr. 78-80]. Mr. O'Quinn then filed an Opposition to Ms. Kline's Application for Decree [Tr. 99-108]. In this same time frame, Ms. Kline filed a First Amended Original Petition with the Trial Court. [Tr. 53-57] This pleading presented no claim against Mr. O'Quinn except to have the Arbitrators' Award confirmed (there was no claim for post-Award attorneys fees); Ms. Kline's only claim was lodged against Bank One. [Tr. 55-57] This pleading was consistent with the position initially taken by Ms. Kline before the Trial Court that the Arbitration Award is *res judicata* as to all of Ms. Kline's claims against Mr. O'Quinn arising out of this *transaction*.

On October 2, 1992, the Trial Court held a hearing regarding the issues raised by Mr. O'Quinn's Motion to Vacate, or, Alternatively, to Modify and Correct the Award, and by Ms. Kline's Application for Decree. [Tr. 274-275] At this initial hearing, the Trial Court ruled that the arbitrators exceeded their authority by ordering Mr. O'Quinn to pay punitive

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2/ The record in this Appeal is replete with many duplicate copies, some of them incomplete, of the same documents, pleadings, letters, and other exhibits filed with the Trial Court. We have tried whenever possible to refer to the most easily accessible of the various copies of the instrument in question.

damages and by ordering payment of the Award within thirty (30) days after it was signed (the Arbitrators did not give the parties time to file Motions for modification or have the courts consider the propriety of the Arbitrators' Award). [Tr. 274-275] At the conclusion of this hearing, the parties agreed to try to work out an appropriate order reflecting the Trial Court's ruling.

When the parties were unable to agree on an appropriate form of order, the Trial Court held another hearing on October 9, 1992. [Tr. 275] At this hearing, the parties addressed the various issues raised by the drafts they had exchanged. The Trial Court again ruled that the Arbitrators exceeded the scope of their authority by awarding punitive damages and by requiring payment of the award within thirty (30) days. The Trial Court also ruled that Ms. Kline was not entitled to a recovery of attorney's fees incurred in connection with her efforts to confirm the Award. [Tr. 275] It was becoming evident that the delay and the reason that Ms. Kline was incurring attorneys fees was not because Mr. O'Quinn was opposing the entry of a Judgment confirming the portions of the Arbitrators' Award that, even though Mr. O'Quinn believed them to be wrong, were at least within the scope of the issues that had been submitted to arbitration. Indeed, Mr. O'Quinn had stated that he would agree to a Judgment that confirmed the actual damages component of the Arbitrators Award and that he would pay the Judgment and not appeal it. Instead, Ms. Kline refused to accept the Trial Court's decision that the Arbitrators' attempt to award punitive damages was improper, that the Arbitrators' efforts to make the Award payable within thirty days was improper, and that Ms. Kline's efforts to recover post-Award attorney's fees was improper.

At this second hearing, the Trial Court then instructed the parties to brief the issue of what, if any, issues remained for trial with respect to Ms. Kline's claims against Mr. O'Quinn. On October 22, 1992, a letter was filed on behalf of Ms. Kline.

[Tr. 126-130] This letter asserted once again that the Award should be confirmed. Ms. Kline also took the position, however, that if the Trial Court refused to completely confirm the Award, then the Trial Court should allow Ms. Kline to proceed to trial against Mr. O'Quinn on the issue of punitive damages. [Tr. 126-130]

On October 29, 1992, Mr. O'Quinn's attorneys filed a letter stating Mr. O'Quinn's position on the issues raised by Ms. Kline. [Supp. Tr. 13-24] Mr. O'Quinn pointed out that the doctrine of *res judicata* barred the relitigation of the same factual transaction which was the subject of the arbitration proceeding and the resulting Award. Accordingly, Mr. O'Quinn's letter pointed out that there were no remaining issues for trial.[3/]

On October 30, 1992, Mr. O'Quinn filed his Motion for Judgment. [Tr. 274-276] In accordance with the Trial Court's earlier rulings, Mr. O'Quinn's Motion for Judgment sought to modify the Award to eliminate the purported award of punitive damages and to confirm the remainder of the Award as modified. On November 6, 1992, the Trial Court held a hearing on Mr. O'Quinn's Motion. At this third hearing, the Trial Court reconfirmed her prior rulings but declined to enter a Judgment incorporating her prior rulings. The Trial Court stated that there should be only one Judgment signed in this case and that such Judgment would be signed after all of the issues were resolved.

Ms. Kline has consistently admitted that she obtained an Award in the arbitration proceeding for all of the compensatory

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3/ Among others, the following materials discuss in some detail the history of this dispute after the Arbitrators entered their Award: undersigned counsel's October 29, 1992 letter to Judge Lindsay [Supp. Tr. 13-24] and *O'Quinn's Memorandum of Law* presented to the Trial Court [Supp. Tr. 65-82].

damages she claims she sustained in this *transaction*. [SOF 303-308] In spite of the *one recovery* rule, Ms. Kline argued she should be entitled to a trial against Bank One. The Trial Court held that Ms. Kline's case against Bank One could proceed to trial and that after the trial the Court would enter Judgment.

On December 18, 1992, the Trial Court held a pretrial hearing. At this pretrial hearing, the parties again addressed the issue of what, if any, issues remained for trial as between Ms. Kline and Mr. O'Quinn. [SOF PT 4-21][1] The Trial Court again ruled, as in its earlier hearings, that the portion of the Award purporting to grant punitive damages was incorrect and the Award would be modified. [SOF PT 21] The Trial Court also refused to allow Ms. Kline to recover her attorney's fees incurred in connection with confirming and enforcing the Award. [SOF PT 34] Ms. Kline then argued in the alternative that she should be entitled to a trial on the issue of punitive damages alone. [SOF PT 19-20] The Trial Court rejected this idea. [SOF PT 21]

Although the Trial Court's rulings made it clear that there were no issues remaining for trial as against Mr. O'Quinn, the Trial Court did not enter any written order. Instead, the Trial Court carried Mr. O'Quinn with the case, which proceeded to trial against Defendant Bank One on December 21, 1992. At the time of the trial, Mr. Pearson argued for the first time that the Award should be modified to eliminate the punitive damages awarded against him. The Trial Court held that Mr. Pearson failed to timely challenge the punitive damages awarded by the arbitrators to Ms. Kline from him. [SOF PT 21-32] During the trial, the Trial Court refused to allow Mr. O'Quinn's counsel to participate in the proceedings. [SOF 40-

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[1] The abbreviation PT stands for the PreTrial portion of the Statement of Facts. The record contains two volumes beginning with page 1, *i.e.*, the PreTrial volume and the first volume of the trial.

41, 569] The Trial Court ordered counsel for Mr. O'Quinn to leave counsel table and sit in the spectators' section. [SOF 40-41, 569] The Trial Court also instructed Mr. O'Quinn's counsel not to object during the trial. [SOF 40-41, 569] Even when Mr. O'Quinn was called as a witness, undersigned counsel was instructed to remain relegated to the Gallery and was not allowed to object or even ask questions. [SOF 569]. Counsel for Mr. O'Quinn, predicting that Ms. Kline was proceeding with trial as a ploy simply to try to "build a record" prejudicial to Mr. O'Quinn, objected to the Trial Court's ruling. Mr. O'Quinn's counsel continued to try to object throughout the proceeding. [SOF PT 51-52; SOF 35, 40-41, 61, 300-302, 479, 513, 569] And that is exactly what happened. Ms. Kline's "case" against Bank One was really nothing more than a relentless effort to disparage Mr. O'Quinn -- who was not allowed in the courtroom, except as a witness and whose counsel was not allowed to object or ask questions, either of Ms. Kline or Mr. O'Quinn.

At the close of Ms. Kline's case in chief on September 28, 1992, Bank One moved for a directed verdict. [SOF 654] After listening to the parties' arguments, the Trial Court granted Bank One's motion. [SOF 670-71] The Trial Court then entered its *Final Judgment* on January 4, 1993. [Tr. 379-82] Ms. Kline now appeals from the *Final Judgment*.

ARGUMENT

I. The punitive damages issues:

There are three extremely important issues presented in this Appeal with respect to the purported award of punitive damages in an arbitration award under the Texas General Arbitration Act. First, should Arbitrators functioning pursuant to the Texas General Arbitration Act, in accordance with constitutional principles or as a matter of public policy, be prohibited from awarding punitive damages -- even if the parties attempt to specifically grant such authority to the arbitrators? Second, even if arbitrators functioning pursuant to the Texas General Arbitration Act are not prohibited constitutionally or as a matter of public policy from awarding punitive damages, may arbitrators attempt to award punitive damages when the issue of punitive damages was not expressly submitted to arbitration? Third, even if arbitrators functioning pursuant to the Texas General Arbitration Act are not prohibited constitutionally or as a matter of public policy from awarding punitive damages and even if the issue of punitive damages may be submitted to arbitration by implication, may arbitrators exceed their authority by attempting to award punitive damages when the applicable law does not allow the award of punitive damages? To the best of the knowledge of undersigned counsel, the few Texas decisions dealing with the issue of whether arbitrators may award punitive damages, *i.e.*, ***USX Corp. v. West***, 781 S.W.2d 453 (Tex. App. -- Houston [1st Dist.] 1989, no writ); ***Grissom v. Greener & Sumner Constr., Inc.***, 676 S.W.2d 709 (Tex. App. -- El Paso 1984, writ ref'd n.r.e.), did not deal with the issues raised in this case.

A. Arbitrators functioning pursuant to the Texas General Arbitration Act should not, in accordance with the Constitution and as a matter of public policy, be allowed to award punitive damages -- even if the parties attempt

to specifically grant such authority to the arbitrators:

There are two fundamental reasons why arbitrators should not be allowed to award punitive damages in arbitration proceedings conducted pursuant to the Texas General Arbitration Act, *i.e.*, (1) arbitration proceedings lack the substantive and procedural safeguards required by the Due Process Clause of the United States Constitution and the Due Course of Law Clause of the Texas Constitution, and (2) allowing Arbitrators to award punitive damages is contrary to the public policies of this State.

B. Because arbitration proceedings do not comply with constitutional principles applicable to the award of punitive damages, arbitrators should not, as a matter of law, be permitted to award punitive damages, even if the parties have expressly or impliedly attempted to bestow that authority upon the Arbitrators:

The concept of punitive damages has its roots in the English common law and was recognized in early American jurisprudence. Over the past two centuries, courts in our country and in the State of Texas have summarily found that punitive damage awards are constitutional. It was only recently that the United States Supreme Court began examining the constitutionality of punitive damage awards in the light of Due Process requirements -- both procedural and substantive -- of the Fourteenth Amendment to the United States Constitution. These decisions by the Supreme Court are extremely important to this Appeal because Due Process of law applies to arbitration proceedings as well as to trial by a Court or Jury; the Parties do not waive their right to Due Process of law simply by agreeing that their disputes will be submitted to arbitration.

In ***Pacific Mutual Life Ins. Co. v. Haslip***, 499 U.S. 1, 111 S. Ct. 1032 (1991), the Supreme Court held that the common law method for assessing punitive damages is not so inherently unfair as to deny Due Process and to be *per se* unconstitutional. The Court went on to hold, however, that this is not the end of the matter. The Court held that neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack. ***Id.*** at 1043.

The Court held that one must concede that unlimited Jury discretion -- or unlimited judicial discretion for that matter -- in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities. ***Id.*** at 1043. The Court held that it need not, and indeed, cannot draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. The Court said it could, however, say with certainty that general concerns of reasonableness and adequate guidance from the trial court when a case is tried to a Jury properly enter into the constitutional calculus. ***Id.*** at 1043. With those concerns in mind, the Supreme Court reviewed the constitutionality of the punitive damages awarded in the ***Haslip*** case.

The Supreme Court in ***Haslip*** indicated that the Jury's discretion with respect to punitive damages is constitutional only when a trial court gives the Jury reasonable and adequate guidance in making such awards. The Supreme Court noted that under Alabama law, as under the law of most states, punitive damages are imposed for purposes of retribution and deterrence, not to compensate the plaintiff for any injury. The Court observed that the instructions in ***Haslip*** informed the Jury that its discretion should be guided by this purpose. ***Id.*** at 1044.

In addition, the Supreme Court in ***Haslip*** indicated that punitive damages are constitutional only when the instructions given to the Jury describe the standards to be used by the Jury

in determining whether to impose such awards. Although Juries are given significant discretion in the determination of punitive damages, that discretion is not unlimited. In ***Haslip***, the Court found that the Jury's discretion was confined by appropriate instructions to deterrence and retribution and the state policy concerns sought to be advanced. ***Id.*** at 1044. The Court found that the Jury was instructed that if punitive damages were to be awarded, the Jury "must take into consideration the character and degree of the wrong as shown by the evidence and necessity of preventing similar wrong." ***Id.*** at 1044.

The Supreme Court in ***Haslip*** held that the discretion vested in the Jury under the traditional common law rules for awarding punitive damages may also be justified as constitutional by the existence of post-trial procedures for scrutinizing punitive damage awards. ***Id.*** at 1044. In ***Haslip***, the Court indicated that the procedures established by the Alabama courts ensured meaningful and adequate review by the trial court whenever a Jury fixed the amount of punitive damages. The Court noted that the Supreme Court of Alabama had established post-trial procedures for scrutinizing punitive awards. Under this procedure, Alabama trial courts are to reflect in the record the reasons for interfering with a Jury verdict, or refusing to interfere with a Jury verdict, on grounds of excessiveness of the damages. Among the factors deemed appropriate for an Alabama trial court's consideration are: (1) the culpability of the defendant's conduct, (2) the desirability of discouraging others from similar conduct, (3) the impact upon the parties, and (4) other factors, such as the impact on innocent third parties. ***Id.*** at 1044. The United States Supreme Court held that this test ensures meaningful and adequate review by the Trial Court whenever a Jury has fixed the punitive damages. ***Id.*** at 1044.

The United States Supreme Court went on to state that the procedures established by the Alabama Supreme Court provide still an additional check on the Jury's or trial court's

discretion in awarding punitive damages. *Id.* at 1045. Under these Alabama procedures, the reviewing court first undertakes a comparative analysis and then it applies detailed substantive standards the Alabama Supreme Court has developed for evaluating punitive awards. In so doing, it makes its review to ensure that the award does not exceed an amount that will accomplish society's goal of punishing and deterrence. *Id.* at 1045. The Court noted that this appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition. The United States Supreme Court noted that the Supreme Court of Alabama has elaborated and refined the criteria for determining whether a punitive award is reasonably related to the goals of deterrence and retribution. Specifically, the Alabama Supreme Court has announced that the following factors may be taken into consideration in determining whether the award was excessive or inadequate: (a) whether there is a reasonable relationship between punitive damages awarded and the harm likely to result from the defendant's conduct, as well as the harm that has actually occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the financial position of the defendant; (e) all costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation. *Id.* at 1045.

The United States Supreme Court concluded that the application of these standards imposes a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages. The Supreme Court held that these standards have real effect when applied by the Alabama Supreme Court to jury awards. The Supreme Court

noted that these standards have resulted in the reduction of punitive awards in Alabama and that they provide for a rational relationship in determining whether a particular award is greater than necessary to punish and deter. 111 S.Ct. 1045-46.

In ***TXO Production Corp. v. Alliance Resources Corp.***, ___ U.S. ___, 113 S. Ct. 2711 (June 25, 1993), the United States Supreme Court again reviewed the limits imposed by the Due Process Clause of the Fourteenth Amendment upon the award of punitive damages. The Court considered the arguments of each of the adversaries and rejected such arguments. The Court turned again to what it said two Terms earlier in ***Haslip***, "We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that a general concern of reasonableness properly enters into the constitutional calculus." ***Id.*** at 2720.

With this concern for reasonableness in mind, the Supreme Court turned to the argument that the punitive damages awarded in the case were so grossly excessive as to violate substantive Due Process. The Supreme Court concluded that because West Virginia law requires as a matter of fundamental fairness that punitive damages bear a reasonable relationship to compensatory damages or the magnitude of the potential harm that defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as to the possible harm to the other victims that might have resulted if similar future behavior were not deterred, there was sufficient concern by the West Virginia trial courts with the reasonableness of the award such that the award did not violate the substantive component of the Due Process Clause. ***Id.*** at 2720-721.

Turning to the procedural component of the due process clause, the Court indicated that the inquiry could include whether the punitive damages award is a result of a fundamentally unfair procedure because the Jury was not adequately

instructed, whether the award was adequately reviewed by the trial or appellate courts, and whether the defendant had no advance notice that the Jury might be allowed to return such a large award or to rely on potential harm as a basis for its calculation. The Court declined to address the first argument as it was not argued or passed on below. The Court concluded that in fact the Jury's award was adequately reviewed by the trial court and the appellate court and that defendant had notice under prior law that punitive damages could be awarded under the circumstances of the case. Thus, the United States Supreme Court found no procedural violation of Due Process as a result of the procedures used in West Virginia for the awarding of punitive damages. *Id.* at 2720-724.

The Texas Constitution contains its own Due Process Clause. TEX. CONST. ART I, § 19. In ***Prudential Ins. Co. of America v. Jefferson Associates, Ltd.***, 839 S.W.2d 866, 876-77 (Tex. App. -- Austin 1992, writ granted), the Court of Appeals for Austin held that a Jury's award of punitive damages did not violate the Due Process Clause of the United States Constitution or the Due Process Clause of the Texas Constitution (although the Texas Constitution uses the term "Due Course of Law") because many of the judicial safeguards relied upon in ***Haslip*** are applicable in the Texas state courts. The Court of Appeals noted that the opportunity for review by a trial court is available by both the trial court and the appellate courts. This review process includes the power of granting a remittitur. ***Id.*** at 877. With respect to the power of remittitur as applied to the Jury's award of punitive damages, the Court of Appeals held that it was obligated under ***Alamo National Bank v. Kraus***, 616 S.W.2d 908, 910 (Tex. 1981), to assess each of the five factors specified in ***Kraus*** in the light of the facts and circumstances of the particular case. ***Prudential Ins.***, 839 S.W.2d at 878. Under the facts of the ***Prudential*** case, the Court of Appeals concluded, based upon a review of all of the evidence in the record in view of the ***Kraus*** factors, as well as the reasonableness of the ratio of exemplary damages to actual damages, that the trial court did not err in failing to order a remittitur.

Id. at 879. The Court of Appeals also noted that the gross negligence standard upon which Texas allows exemplary damages is not unduly vague and that such standard satisfies the Due Process safeguards guaranteed by the Federal and State Constitutions. The Court of Appeals concluded that adequate procedural safeguards are provided by the normal Jury trial, trial court review, and appellate review process to satisfy both Federal and State Constitutional due process concerns with respect to the Jury's award of punitive damages.

Unlike the normal judicial process in which punitive damages are awarded, the reasonable substantive and procedural safeguards required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Due Course of Law provision of the Texas Constitution are not met by the process by which punitive damages are awarded by arbitrators.

There is no procedure whereby the arbitrators are provided, either by the Trial Court or the American Arbitration Association or some other supervising organization, instructions that articulate the purposes of punitive damages, *i.e.*, to punish and to deter the defendant, and when and under what circumstances the law allows the award of punitive damages, *e.g.*, punitive damages may not be awarded for breach of contract.

There is no procedure for controlling and limiting the evidence submitted to the Arbitrators and the statements made by the parties and their advocates to the Arbitrators. Virtually anything can be done or said during an arbitration hearing -- and apparently was in this case. Arbitrators allow almost all documents and testimony into evidence. The rules of evidence are rarely adhered to; frequently, attorneys for the parties are admonished to make no objections. Emotional and prejudicial testimony that would never be admitted into evidence by a trial court in a jury trial will usually be considered by arbitrators. There is often no transcript and thus there is no mechanism for

the trial court or appellate courts to determine what evidence was considered by the arbitrators.

There is no procedure applicable to arbitration for the trial court or the appellate courts to review the testimony and documents considered by the arbitrators or the basis on which the arbitrators made their award of punitive damages. It is only a matter of good fortune that in this case we can determine from Ms. Kline's Demand For Arbitration, the pleadings she submitted to the Arbitrators, the damages she claimed, and the Arbitrators' Award, that the Arbitrators exceeded their authority by purporting to award punitive damages when there was no basis in the law.

There is no procedure for the trial court in connection with the confirming of an arbitrators' award, or the appellate courts in reviewing the arbitration proceeding, to determine whether the award of punitive damages by the arbitrators is excessive taking into account the factors articulated by the Texas Supreme Court: (i) whether the exemplary damages are reasonably proportional to actual damages, (ii) the nature of the wrong, (iii) the character of the conduct involved, (iv) the culpability of the wrongdoer, (v) the situation and sensibilities of the parties, and (vi) the extent to which the wrongful conduct offends a public sense of justice and propriety. *See, e.g.*, ***Alamo National Bank v. Kraus***, 616 S.W.2d 908, 910 (Tex. 1981).

In this case, as in virtually all cases where arbitrators award punitive damages, the few safeguards imposed by the legal system on the substantive decision by the Arbitrators to award punitive damages and on the procedural aspects of the arbitration proceeding by which the punitive damages are imposed and reviewed, simply fail to satisfy the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Due Course of Law provision of the Texas Constitution. As such, the Trial Court's decision to modify the Award to eliminate the punitive damages purportedly imposed on Mr. O'Quinn was correct because the award of

punitive damages violated the Due Process Clauses of the United States and Texas Constitutions.

C. Arbitrators should not as a matter of public policy be permitted to award punitive damages, even if the parties have expressly or impliedly attempted to bestow that authority upon the Arbitrators:

Even if this Court concludes that arbitration proceedings are constitutionally acceptable, this appeal presents the issue whether Arbitrators functioning pursuant to the Texas General Arbitration Act should, pursuant to public policy considerations, be prohibited from awarding punitive damages -- even if the parties attempt to specifically grant such authority to the arbitrators.

In *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793 (1976), the New York Court of Appeals examined this precise issue. The Court of Appeals held, not on constitutional grounds, but as a matter of public policy, that an arbitrator has no power to award punitive damages, even if the parties had attempted to bestow that power on the arbitrator. The court held that punitive damages is a sanction reserved to the state, a public policy of such magnitude as to call for judicial intrusion to prevent its contravention. *Id.* at 794. Because enforcement of an award of punitive damages as a purely private remedy would violate strong public policy, the New York Court of Appeals held that an arbitrator's award which imposes punitive damages should be vacated. *Id.* at 794.

The factors considered by the New York Court of Appeals which constituted the bases for its conclusion were:

(1) At law, on the civil side, in the absence of statute, punitive damages are available only in a limited number of instances. Punitive damages are allowed in

cases where the wrong complained of is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant, but to deter him, as well as others who might otherwise be so prompted, from indulging in similar conduct in the future. It is a so-called exemplary "remedy," not a private compensatory remedy. ***Id.*** at 795.

(2) Punitive damages are not available for mere breach of contract, for in such a case, only a private wrong, and not a public right, is involved. ***Id.*** at 795. Even if there was a so-called "malicious" breach of the contract, that would not permit the imposition of punitive damages. Punitive sanctions are reserved to the State. This is a public policy of such magnitude as to call for judicial intrusion. ***Id.*** at 796.

(3) The evil of permitting an arbitrator, whose selection is often restricted or can be manipulated by the party in a superior bargaining position, to award punitive damages is that it displaces the Court and the Jury, and therefore the State, as the engine for imposing a social sanction. Actual damages are measurable against some objective standard. But punitive damages take their shape from the subjective criteria involved in attitudes toward correction and reform, and Courts do not readily accept the delegation of that kind of power. Where punitive damages have been allowed for those torts which are still regarded somewhat as public penal wrongs, as well as actionable private wrongs, they have rather close judicial supervision. ***Id.*** at 796.

(4) Standards, such as whether the award of punitive damages was irrational or unjust, are subjective and afford no practical guidelines for the arbitrator and little protection against abuse. Moreover, even if such standards were imposed on the arbitration proceeding in an effort to install fairness to the system, the imposition of

the standards would be contrary to the sound development of arbitration law. *Id.* at 796.

(5) The parties to arbitration agree to the substitution of a private tribunal for purposes of deciding their disputes without the expense, delay, and rigidities of traditional courts. If arbitrators are allowed to impose punitive damages, the usefulness of arbitration will be destroyed. It will become a trap for the unwary, given the imminently desirable freedom from judicial overview of law and facts. It would mean that the scope of the determination by arbitrators, by the license to award punitive damages, would be both unpredictable and uncontrollable. *Id.* at 796.

(6) In imposing penal sanctions in private arrangements, a tradition of the rule of law in organized society is violated. One purpose of the rule of law is to require that the use of coercion be controlled by the State. In a highly developed commercial and economic society, the use of private force is not the danger, but the uncontrolled use of coercive economic sanctions in private arrangements is. The power to punish is a monopoly of the State and not that of any private individual. *Id.* at 796-797.

(7) The parties usually never agreed, or, for that matter, even considered punitive damages as a possible sanction for breach of an agreement. Even if the parties had sought to agree that the arbitrators could award punitive damages, the law does not and should not permit private persons to submit themselves to punitive sanctions of the order reserved to the State. The freedom of contract does not embrace the freedom to punish, even by contract. *Id.* at 797.

(8) Under common law principles, there is eventual supervision of Jury awards of punitive damages,

in the singularly rare cases where they are permitted, by the trial court's power to change awards and by the appellate court's power to modify such awards.

The Court of Appeals held that the fact the award of punitive damages was quite modest is immaterial. Such a happenstance is not one on which to base a rule. 353 N.E.2d at 797.

Other States have adopted this same holding for public policy reasons. For example, in ***Shaw v. Kuhnel & Associates, Inc.***, 698 P.2d 880, 881 (N.M. 1985), the Supreme Court of New Mexico held, citing ***Garrity***, that an Arbitrator should not be given authority to award punitive damages; this power is reserved to the Courts. In ***United States Fidelity & Guaranty Co. v. DeFluiter***, 456 N.E.2d 429 (Ind. Ct. App. 1983), the Indiana Court of Appeals held that because arbitration arises out of a contractual relationship, punitive damages are unavailable because parties may not contract to benefit from or be penalized by punitive damages. ***Id.*** at 432. ***See also, School City of East Chicago, Indiana v. East Chicago Federation of Teachers***, 422 N.E.2d 656, 663 (Ind. Ct. App. 1981).

The Trial Court's decision to modify the Award to eliminate the punitive damages purportedly imposed on Mr. O'Quinn was correct because the award of punitive damages violates important public policy concerns of the State of Texas. The policy concerns recognized by New York's highest court are true in Texas just as they are in New York. Just as the New York Court of Appeals recognized, parties agree to arbitration for purposes of deciding their disputes without the expense, delay, and rigidities of traditional courts. If arbitrators are allowed to impose punitive damages, the usefulness of arbitration will be destroyed. It will mean, just as the New York Court of Appeals predicted, that the scope of the determination by arbitrators, by virtue of the license to award punitive damages, will become unpredictable and uncontrollable. Indeed, if arbitrators can award punitive damages without being

subjected to even the controls required for a Jury to award punitive damages, and without the trial court and appellate court review required with respect to Jury awards, contracting parties will seek to avoid arbitration. On the other hand, if as a matter of public policy Arbitrators are not allowed to award punitive damages, arbitration will become an even more effective and favored means for resolving disputes between contracting parties.

B. The parties did not submit the issue of punitive damages to the arbitration proceeding:

Although it is often assumed that an arbitration award is entitled to great deference by the courts, this assumption is untrue with respect to the authority and jurisdiction of the arbitrators. To the extent possible, an arbitrator's decision as to the scope of his authority is subject to the scrutiny of the courts to ensure that the arbitrator acted properly. *E.g.*, ***E. I. Du Pont de Nemours & Co. v. Local 900***, 968 F.2d 456, 458 (5th Cir. 1992). An award in excess of the arbitrator's authority is void. *See, e.g.*, ***Couey v. Arrow Coach Lines***, 288 S.W.2d 192, 196 (Tex. Civ. App. -- Austin 1956, no writ). This concept is reflected in the Texas General Arbitration Act. Article 237 requires that an award be vacated when the arbitrators exceed their authority and Article 238 requires the modification or correction of an award when the arbitrators make an award on a matter not submitted to them. TEX. REV. CIV. STAT. ANN. ARTS 237 AND 238 (VERNON 1973). As detailed below, the Trial Court's finding and conclusion that the Award failed to conform either to the parties' arbitration agreement or the relief sought by Ms. Kline and that it exceeded the scope of the arbitrators' authority is correct and should be affirmed.

1. The Trial Court's *Final Judgment* was entered only after the Court had repeated opportunities to consider the issues at various hearings and after a trial:

Ms. Kline accuses the Trial Court of granting a "summary judgment sua sponte." (App. Brief 22-24). This is completely wrong. Mr. O'Quinn filed a Motion to Vacate, or, Alternatively, Modify and Correct the Award. Mr. O'Quinn subsequently filed a Motion for Judgment. There were multiple hearings on these Motions. Ms. Kline received notice of each of the hearings on these Motions. In fact, her counsel attended every single hearing and was quite vocal in expressing his views. Moreover, the procedure followed by the Trial Court is entirely consistent with the Texas General Arbitration Act. Because the Trial Court correctly followed the statutory procedure for implementation or correction of an arbitration award, Ms. Kline's rhetoric about a fictional "summary judgment" is completely misplaced.

After incorrectly describing the *Final Judgment* as a "summary judgment," Ms. Kline goes on to suggest that this Court should review the *Final Judgment* as if it were a summary judgment. In fact, the *Final Judgment* was entered only after a bench trial in which Ms. Kline and her counsel were granted their fondest wish -- unfettered reign to attack Mr. O'Quinn. Because undersigned counsel was barred from the counsel table and was not allowed to object or question witnesses -- including his own client, Mr. O'Quinn -- there was no opportunity to respond to the accusations of Ms. Kline and her counsel. Ms. Kline was allowed to do and say almost anything without control or restraint. The record in this case is but a modest example of what can occur in an arbitration proceeding -- and in this case did occur -- when a talented, aggressive, and unrestrained trial lawyer feels like he is on a roll and, irrespective of what issues were pled and submitted to the arbitrators or

what issues were defended against, in his Closing Arguments to the arbitrators asks for relief that was not presented or tried. And then there is no meaningful judicial review by the trial courts or the appellate courts of what occurred during the arbitration because of the lack of a transcript and because the theory of arbitration is that there should be limited judicial review of arbitration proceedings.

2. The Texas General Arbitration Act requires the Trial Court to modify and correct the Award in appropriate circumstances:

Articles 236, 237, and 238 provide the appropriate procedure for the implementation or correction of an arbitration award. Article 236 provides the general rule that an award should be confirmed unless a motion to vacate or modify or correct the award is timely urged. TEX. REV. CIV. STAT. ANN. art. 236 (Vernon 1973). With respect to modification, Article 238 requires a court to modify or correct the award if

> The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issue submitted . . . .

TEX. REV. CIV. STAT. ANN. art. 238(A)(2). Article 238(B) further provides that, if the application to modify or correct is granted, "the court ***shall*** modify and correct the award so as to effect its intent and ***shall*** confirm the award as to modified and corrected." ***Id.*** art. 238(B) (emphasis added).

All arbitration proceedings in this State, whether conducted pursuant to the common law, the Texas General Arbitration Act, or the Federal Arbitration Act, arise out of consensual understandings. Article 224 of the Texas General Arbitration Act makes clear that a written agreement is required to compel parties to arbitrate their disputes and the terms of the written agreement govern which disputes are submitted to arbitration. TEX. REV. CIV. STAT. ANN. ART 224 (VERNON SUPP. 1993). Because arbitration provisions are in derogation of a right of trial by Jury, arbitration is not extended beyond the terms of the contract or to issues and matters not covered thereby. *See, e.g.,* ***Seale v. Roy M. Mitchell Contracting Co.***, 321 S.W.2d 149,

150 (Tex. Civ. App. -- Austin 1959, writ ref'd). Texas courts consistently hold that the parties must have *specifically agreed* to arbitrate the particular matter in dispute. *See, e.g., **Valero Energy Corp. v. Wagner & Brown***, 777 S.W.2d 564, 566 (Tex. App. -- El Paso 1989, writ denied). Similarly, the United States Supreme Court has admonished that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." ***United Steelworkers v. Warrior & Gulf Navigation Co.***, 363 U.S. 574, 582 (1960).

Due process of law applies in arbitration proceedings just as in other legal proceedings. This means that parties are entitled to fair notice of the claims made against them. Under Texas law, a pleading must provide the opponent fair notice of the claims in issue. *See, e.g., **Stone v. Lawyers Title Ins. Corp.***, 554 S.W.2d 183, 186 (Tex. 1977). The object and purpose of a pleading is to give fair and adequate notice to the party being sued of the nature of the cause of action asserted against him so he may adequately prepare his defense. *See **Castleberry v. Goolsby Bldg. Corp.***, 617 S.W.2d 665, 666 (Tex. 1981) (holding that claims of negligence and gross negligence are not sufficient to provide fair notice that the claimant's cause of action was actually intended to be for intentional injury).

The claims that Ms. Kline presented to the arbitrators were defined by her Plaintiff's Original Petition. By letter of May 28, 1991 from Ms. Kline's counsel to Ms. Tamme S. Wilkes of the American Arbitration Association, Ms. Kline's counsel transmitted the Original Petition to the American Arbitration Association as the definition of Ms. Kline's claim. In her Original Petition, Ms. Kline alleged breach of contract, breach of an alleged tort duty of good faith, and breach of an alleged fiduciary duty. Ms. Kline pled and prayed only for actual damages, *i.e.*, economic losses. Ms. Kline did not plead or pray for exemplary damages. Indeed, there is no mention -- not one single word -- in the Original Petition about exemplary damages.

Rule 56 of the Texas Rules of Civil Procedure provides that special damages must be specifically pled. Special damages are those that result from the defendant's alleged wrongful conduct but are of such an unusual nature that they normally vary with the circumstances of the individual case in which they occur. *See Sherrod v. Bailey*, 580 S.W.2d 24, 28 (Tex. Civ. App. -- Houston [1st Dist.] 1979, writ ref'd n.r.e.). Exemplary damages are in the nature of special damages. In order to recover exemplary damages, there must be a specific claim for such damages or the allegations with respect to the alleged wrong must be pled in such detail as to comply with the fair notice requirements of Texas law. For example, in *Nipper v. U-Haul Company of San Antonio*, 516 S.W.2d 467 (Tex. Civ. App. -- Beaumont 1974, no writ), the Court of Appeals examined a pleading in which the plaintiff alleged in conclusory fashion that the defendant owed her a contractual debt, that the amount of the debt "constituted trust funds of the Plaintiff in the hands of the Defendant," and that the defendant "willfully, maliciously, and fraudulently converted such funds to his own use" -- allegations which are strikingly similar to Ms. Kline's allegations. The Court of Appeals held that as a matter of law such pleadings were insufficient to support an award of exemplary damages. *Id.* at 470.

In this case there was no pleading or prayer -- no notice whatsoever -- that Ms. Kline was asking for punitive damages. Moreover, Ms. Kline did not plead the existence of a separate and distinct tort that caused separate actual damages in tort. Each of these elements is required by Texas law before a claimant can recover punitive damages. Lawyers who are trained to recognize the necessary elements of a claim for punitive damages simply could not have known from Ms. Kline's pleadings that she was thinking about attempting to recover punitive damages. The law does not require them to guess as what Ms. Kline might be secretly planning.

3. The parties' agreement precluded the submission of the question of punitive damages:

The dispute submitted to the arbitrators arose out on a written agreement entered into among Ms. Kline, Mr. O'Quinn and Mr. Pearson relating to the apportionment of legal fees received from several cases. In this agreement, there was an arbitration provision which provides as follows:

> In the event that a dispute arises among Parties that cannot be amicably resolved or, Parties have elected to terminate this Agreement and are unable to reach an agreement to that end, said dispute shall be determined by arbitration conducted in the City of Houston, State of Texas, in accordance with the rules then in force of the American Arbitration Association. [Tr. 34]

By this agreement, Mr. O'Quinn, Ms. Kline and Mr. Pearson did not expressly, or even by implication, grant authority to the Arbitrators to award exemplary damages in connection with disputes arising out of an alleged breach of the contract in dispute. Moreover, this arbitration provision is fairly narrow -- it avoids the broad terminology frequently found in arbitration provisions that the parties submit "any and all claims, demands, disputes, controversies, or other matters pertaining to the written agreement in issue, whether or not arising independently out of the written agreement, and whether in contract, tort or otherwise." The use of the narrow arbitration provision in the agreement among Ms. Kline, Mr. O'Quinn, and Mr. Pearson thus demonstrates that the parties intended for the arbitrators to resolve contractual disputes, <u>not</u> to award exemplary damages for alleged activities outside the scope of the contract.

The arbitration provision in the contract among Ms. Kline, Mr. O'Quinn and Mr. Pearson certainly did not specifically authorize the arbitrators to award punitive damages for activities for which punitive damages may not be awarded under Texas law, *i.e.*, for breach of contract. In this case, as discussed below, the only alleged activities that could have possibly given rise to punitive damages would have been activities outside the agreement. The arbitration provision did not specifically authorize the arbitrators to award punitive damages for outside-the-contract activities. Because of the unique and harsh nature of punitive damages, it is inappropriate to assume that the parties intended the arbitration provision to authorize the arbitrators to award punitive damages for outside-the-contract activities.

While the issue is not settled in Texas, the El Paso Court of Appeals has held that the arbitrators have the power to award punitive damages -- where the parties have ***expressly*** submitted the issue to the arbitrators. ***Grissom v. Greener & Sumner Constr., Inc.***, 676 S.W.2d 709, 711 (Tex. App. -- El Paso 1984, writ ref'd n.r.e.). But the ***Grissom*** decision is not applicable here because the parties here did not expressly submit the issue to the arbitrators. It is respectfully that, as a matter of law, arbitrators should not be allowed to award punitive damages unless the parties have specifically and expressly granted that authority to the arbitrators.

Ms. Kline relies heavily on ***USX Corp. v. West***, 781 S.W.2d 453 (Tex. App. -- Houston [1st Dist.] 1989, no writ), and ***Riha v. Smulcer***, 843 S.W.2d 289 (Tex. App. -- Houston [14th Dist.] 1992, no writ). Neither of these cases support Ms. Kline's position. In ***USX***, this Court refused to mandamus Judge David West to require him to grant a motion to compel arbitration because he had already granted a motion to stay pending arbitration. ***USX***, 781 S.W.2d at 454-56. In effect, the court reviewed the pleadings and submissions to the arbitrators, concluding that they were sufficient to submit various contract and tort claims, and various types of damages, to the arbitrator.

The court then left it to the parties and the arbitrator to address pleading issues. ***Id.*** at 456-57. Significantly, however, the ***USX*** case did not address the basic question of whether an award of punitive damages is constitutional or otherwise banned by public policy.

The ***Smulcer*** case is also irrelevant. Ms. Kline seeks to analogize the present case to ***Smulcer*** because Mr. O'Quinn also unsuccessfully sought to have the arbitrators review the Award prior to its correction by the Trial Court. In ***Smulcer***, however, modification was requested because of a miscalculation. ***Smulcer***, 843 S.W.2d at 291. Here, the Trial Court modified the Award because it exceeded scope of the arbitrators' authority. (Tr. 380) As noted above, an arbitrator's view of his authority is not viewed with the same deference accorded to the merits of the arbitrator's decision. ***E. I. Du Pont de Nemours & Co. v. Local 900***, 968 F.2d 456, 458 (5th Cir. 1992). Hence, the Trial Court's decision that the Award exceeded the scope of the arbitrators' authority should be affirmed.

In addition, it is improper to read too much into the arbitrators' actions in not modifying the Award when asked. As Ms. Kline initially urged, the arbitrators may have simply decided not to consider Mr. O'Quinn's request for modification. (P. Exh. 72) Moreover, placing too much emphasis on the arbitrators' actions will discourage parties to arbitration from requesting reconsideration by the arbitrators. The Texas General Arbitration Act allows a party to decide whether to request modification of an award from the arbitrator, the trial court, or both. TEX. REV. CIV. STAT. ANN. ARTS 232 & 238 (VERNON 1973). To conserve judicial resources and promote judicial economy, the better approach is to encourage the parties to resolve all differences before the arbitrators, not the courts. Mr. O'Quinn did just that. It was only after the arbitrators failed to act that he sought modification by the Trial Court. Mr. O'Quinn should not be penalized for efforts to conserve judicial resources. Accordingly, the failure of the

arbitrators to act on Mr. O'Quinn's request should mean little, if anything.

C. Ms. Kline was never entitled to punitive damages:

1. Under Texas law, there exist, for good reason, special rules applicable to efforts of plaintiffs to recover punitive damages in connection with contract disputes:

In addition to failing to plead and pray for exemplary damages and thus failing to submit the issue of punitive damages to the arbitrators, there is another, perhaps even more important, reason why Ms. Kline as a matter of law may not be awarded exemplary damages. Texas law simply does not allow the recovery of punitive damages for breach of contract, even if the breach is intentional, willful, and malicious. *See, e.g.*, ***Manges v. Guerra***, 673 S.W.2d 180, 184 (Tex. 1984); ***Amoco Prod. Co. v. Alexander***, 622 S.W.2d 563, 571 (Tex. 1981). Because plaintiffs continually attempt to side-step this rule by clever pleading, the Texas Supreme Court has established the rule that a complainant's ability in Texas to recover exemplary damages in connection with a breach of contract claim is subject to special rules and requirements. The Texas Supreme Court has held that in order to recover punitive damages attendant to a contract dispute a claimant must both (1) plead and (2) prove: (a) the commission of a separate tort, and (b) **that the claimant sustained separate actual damages as a result of that separate tort**. See, e.g., ***International Bank, N.A. v. Morales***, 736 S.W.2d 622, 624 (Tex. 1987); ***Texas Nat'l Bank v. Karnes***, 717 S.W.2d 901, 903 (Tex. 1986); ***Jim Walter Homes, Inc. v. Reed***, 711 S.W.2d 617, 618 (Tex. 1986); ***Bellefonte Underwriter's Ins. Co. v. Brown***, 704 S.W.2d 742, 745 (Tex. 1986).

Simply alleging, as Ms. Kline did, that the defaulting party to a contract allegedly also breached some tort duty, *e.g.*, fiduciary duties or an implied duty of good faith and fair dealing, will not suffice. There must also be pleading and proof that the separate and distinct tortious conduct caused the claimant to sustain separate and distinct actual damages in tort. It is only the separate actual damages in tort that will support a claim for exemplary damages! *See, e.g.*, ***International Bank***, 736 S.W.2d at 624; ***Texas Nat'l Bank***, 717 S.W.2d at 903; ***Jim Walter Homes***, 711 S.W.2d at 618; ***Bellefonte Underwriter's Ins. Co.***, 704 S.W.2d at 745.

In a further attempt to side-step these requirements, plaintiffs frequently argue that their economic losses in fact are their required "tort" damages. The Texas Supreme Court has rejected this argument. The Court has established the doctrine that if the actual damages sustained by the claimant are economic losses arising out of breach of the contract involved in the litigation, then no matter how the complainant disguises or characterizes her so-called tort claims, the dispute is simply one of breach of contract. *See, e.g.*, ***Crim Truck & Tractor Co. v. Navistar***, 823 S.W.2d 591, 594-95 (Tex. 1992); ***Southwestern Bell Telephone Co. v. FDP Corp.***, 811 S.W. 2d 572, 577 (Tex. 1991); ***Southwestern Bell Telephone Co. v. Delaney***, 809 S.W.2d 493, 495 (Tex. 1991); ***International Bank***, 736 S.W.2d at 624; ***Texas Nat'l Bank***, 717 S.W.2d at 903; ***Jim Walter Homes***, 711 S.W.2d at 618; ***Bellefonte Underwriter's Ins. Co.***, 704 S.W.2d at 745; and ***Amoco Prod. Co.***, 622 S.W.2d at 571.

In this case, there was no pleading of separate tortious conduct by Mr. O'Quinn that caused separate actual damages in tort to Ms. Kline. Ms. Kline alleged that she sustained economic losses resulting from alleged breach of contract. Ms. Kline claimed she was entitled to monies owed to her under the contract, plus interest. The Award of actual damages made her whole. But then Ms. Kline presented the conclusory rhetoric commonly found in pleadings of this nature, the rhetoric which the Texas Supreme Court has consistently held

gives rise only to a claim for breach of contract. Ms. Kline made the conclusory allegations that Mr. O'Quinn breached an alleged duty of good faith and breach an alleged fiduciary duty. But, even if such allegations were true, which is denied, Ms. Kline did not plead and prove any separate actual damages in tort (*e.g.*, mental anguish, etc.) caused by the alleged tortious conduct. Thus, while these other extraneous allegations may sound bad (in fact, that is why plaintiffs usually add them into their petition when suing on a contract), they do not convert the case into a tort dispute and they will not support an award of punitive damages.[5/]

Unfortunately, there is no transcript of the arbitration proceeding. Hence, this Court must rely on the pleadings and other submissions in order to determine what was submitted to the arbitrators. Although Ms. Kline suggests that it is somehow Mr. O'Quinn's fault that there is no transcript, Ms. Kline also failed to seek a transcript. Hence, the absence of a transcript cannot support any presumption against any particular party to the proceeding.

2. Ms. Kline also failed to plead and prove the type of intentional conduct necessary to support an award of punitive damages:

[5/] In most situations where a plaintiff is suing on a contract and is also attempting to recover exemplary damages, the plaintiff at least pleads that he or she is seeking exemplary damages. This at least gives the defendant fair notice of the plaintiff's intentions. But here Ms. Kline not only failed to plead and prove separate actual damages in tort to support an award of exemplary damages -- but did not even plead or pray for exemplary damages at all!

Assuming that Ms. Kline had actually pled and proved separate actual damages in tort sustained as a result of breach of an alleged duty of good faith and fair dealing and/or an alleged fiduciary duty, she still would not be entitled to punitive damages. A breach of the duty of good faith and fair dealing by itself does not entitle the injured party to punitive damages. A breach of a fiduciary duty by itself does not entitle the injured party to punitive damages. In order to recover exemplary damages for breach of the duty of good faith and fair dealing or breach of fiduciary duty, a complainant must also plead and prove and obtain the additional finding of fraud, malice, or gross negligence. *See* TEX. CIV. PRAC. & REM. CODE § 41.003 (VERNON SUPP. 1993); ***Burk Royalty Co. v. Walls***, 616 S.W.2d 911, 922 (Tex. 1981) (addressing the issue of exemplary damages in general); ***Arnold v. Nat. County Mutual Fire Ins. Co.***, 725 S.W.2d 165, 168 (Tex. 1987) (addressing the issue of exemplary damages in connection with claim of a breach of a duty of good faith and fair dealing); ***Manges v. Guerra***, 673 S.W.2d 180, 184 (Tex. 1984) (addressing the issue of exemplary damages in connection with a claim of breach of fiduciary duty). Because Ms. Kline did not plead or prove this additional element, she was never entitled to an award of exemplary damages for breach of the alleged torts of good faith and fair dealing and/or fiduciary duty. Hence, the Final Judgment should be affirmed.

3. Although the Federal Arbitration Act is not applicable to this situation, guidance is provided under the FAA with respect to when arbitrators have exceeded their authority:

At various times in the hearings before the Trial Court, Ms. Kline has argued that the Federal Arbitration Act and

federal substantive law governs the resolution of these issues. More frequently, however, Ms. Kline has argued that the Texas General Arbitration Act governs. Indeed, by arguing the application of the Texas General Arbitration Act, Ms. Kline was able to prevent Mr. Pearson from attacking the award of punitive damages against him, *i.e.*, Mr. Pearson had failed to comply with the requirements of Articles 237 and 238 of the Texas General Arbitration Act. [SOF 21-32]

Nevertheless, as a result of a relatively recent decision by the United States Supreme Court, it is clear that federal substantive law does not apply in this situation. Even if this transaction did affect interstate commerce, the preemptive effect of the Federal Arbitration Act has been significantly diminished by the United States Supreme Court in ***Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University***, 489 U.S. 468 (1989). In ***Volt***, the Supreme Court held that the Federal Arbitration Act is not so much a "pro-arbitration" statute as it is a "pro-agreement" statute. ***Id.*** at 476. That is, the Federal Arbitration Act mandate is not that disputes be arbitrated, but that agreements to arbitrate be enforced. The Court thus held that when the parties choose the laws of a particular state, they also implicitly agree that state law will apply to the extent it is not in direct conflict with the Federal Arbitration Act. ***Id.*** at 477. In this case, the Agreement included a choice of law provision providing that "This Agreement shall be construed and enforced in accordance with and governed by the laws of the State of Texas." [Tr. 35] Thus, Texas law governs the outcome of this dispute, irrespective of whether the arbitration proceeding is conducted under the Federal Arbitration Act or the Texas General Arbitration Act.

Recently, the United States Court of Appeals for the Second Circuit in ***Barbier v. Shearson Lehman Hutton Inc.***, 948 F.2d 117 (2nd Cir. 1991), considered a situation where an Arbitration Panel rendered an award of punitive damages in connection with a contract dispute in which the parties had

chosen New York law. The Barbiers contended that the application of the ***Garrity*** rule, discussed above, conflicts with federal law and thus should be ignored because State law is preempted by the Federal Arbitration Act. ***Id.*** at 121. The Second Circuit rejected this argument. Citing ***Volt***, the Second Circuit held that the Federal Arbitration Act requires that private agreements to arbitrate be enforced in accordance with their terms. The court noted that the parties elected to abide by the laws of the State of New York in the event of a dispute under the Agreement. The Second Circuit held that the measure of damages is a matter of state substantive law. Because the arbitrators were not entitled to award punitive damages under the laws of the State of New York due to the choice of law provision in the parties' agreement, "it is manifest that the Panel exceeded its authority in awarding punitive damages." ***Id.*** at 122. Thus, the Second Circuit held that the trial court should have vacated that portion of the arbitrators' award which granted punitive damages. ***Id.*** at 123.

The decision is instructive. The Texas General Arbitration Act similarly provides in Section 237 that if the arbitrators exceed their power, this is a basis for vacating an award. Additionally, under Article 238, the fact that the arbitrators have awarded upon a matter not submitted to them is a basis for modifying or correcting an award. As in the case of ***Barbier***, it is manifest that the Arbitrators exceeded their authority when they attempted to award punitive damages when the matter was not submitted to them based on a claim for economic losses for breach of contract. The Trial Court was correct in entering the *Final Judgment* modifying the Award to eliminate the punitive damages against Mr. O'Quinn.

II. The Trial Court properly refused to award attorney's fees incurred in connection with efforts to confirm or enforce the Award:

The Arbitrators considered the *transaction* submitted to them and made certain awards. One of the determinations made by the Arbitrators was:

> Each party shall bear its own attorneys fees and share equally in the fees and expenses of arbitration.

Ms. Kline did not complain about this aspect of the Award within the statutory ninety (90) day period to seek modification. Later on, however, she sought to avoid the arbitrators' ruling and to re-litigate this issue. Ms. Kline clearly waived any right to such fees by failing to seek modification or correction of the Award. *See* TEX. REV. CIV. STAT. ANN. arts. 236 & 238 (requiring the court to confirm the Award unless a request to vacate or modify or correct is timely urged).

Even if the arbitrators had been silent as to the issue (which they were not), and even assuming that Ms. Kline timely sought modification of the Award (which she did not), the Texas courts refuse to allow the recovery of such fees. In ***Kermacy v. First Unitarian Church of Austin***, 361 S.W.2d 734, 735-36 (Tex. Civ. App. -- Austin 1962, writ ref'd n.r.e.), the court denied the request for attorney's fees incurred by a plaintiff in connection with efforts to enforce an arbitration award. The court reasoned that the plaintiff's cause of action was merged into the arbitrator's award and a suit to enforce the award was essentially a new claim for which there was no statutory basis for recovering attorney's fees. Just as in ***Kermacy***, Ms. Kline is not entitled to recover any attorney's fees resulting from her efforts to enforce the arbitration award. Indeed, the Award expressly denies Ms. Kline the right to attorney's fees.

In addition to the *res judicata* effects of the Award, there is still another reason for affirming the Trial Court's refusal to award attorney's fees to Ms. Kline. Article 238-1 of the Texas General Arbitration Act provides that "costs of the application [to confirm, modify, or correct an award] and of the proceed-

ings subsequent thereto, and disbursements may be awarded by the court." TEX. REV. CIV. STAT. ANN. ART. 238-1 (VERNON 1973). It is significant to note that, with respect to awarding costs, Article 238-1 provides that the costs "may be awarded" by the court. This use of the permissive is extremely important because Articles 236, 237, 238, and the first sentence of 238-1 (all of which deal with confirming, vacating, or modifying or correcting the award) use the mandatory term "shall" instead of the term "may." ***Compare Id.*** art. 238-1 ***with Id.*** arts. 236-238.

Because the Texas General Arbitration Act expressly allows the Trial Court discretion with respect to an award of costs, the Trial Court's decision not to award Ms. Kline her fees and costs may be reversed only for an abuse of discretion. Given the express language of the Award, the *res judicata* effects as articulated in ***Kermacy***, and the provisions of Article 238-1, it is clear that the Trial Court did not abuse its discretion. Accordingly, the Trial Court's refusal to allow Ms. Kline to recover her attorney's fees and costs in connection with enforcing the Award should be affirmed.

III. The Trial Court properly refused to allow Ms. Kline to litigate the single issue of punitive damages:

Ms. Kline sued Mr. O'Quinn alleging non-payment of attorney's fees allegedly due her under agreements to which she and Mr. O'Quinn were parties. It is absolutely clear from Plaintiff's Original Petition that the *transaction* at issue here is the non-payment of attorney's fees with respect to certain lawsuits, *e.g.*, the ***Liberty Waste*** cases, the ***Helm*** case, the ***Cook*** and ***Mayfield*** cases, the ***Goings*** case, and so forth. As reflected in Plaintiff's Original Petition, the claims made by Ms. Kline against Mr. O'Quinn pertained to a *transaction* consisting of several contractual agreements with respect to the contingent fees that might be obtained.

By agreement of Ms. Kline, Mr. O'Quinn, and Mr. Pearson, the *transaction* was submitted to arbitration. Ms. Kline's

Demand for Arbitration described the dispute to be arbitrated as a "[d]isagreement among attorneys over contingent fee recoveries." In addition, Ms. Kline used her Plaintiff's Original Petition to define her claims before the arbitrators. The May 28, 1991, letter of Mr. Kline's attorney to the American Arbitration Association stated that Ms. Kline's Plaintiff's Original Petition "states Ms. Kline's position on the matter in controversy more clearly than the papers previously submitted . . . ." As noted, Plaintiff's Original Petition clearly describes the transaction at issue as the non-payment of attorney's fees in connection with the ***Liberty Waste*** cases, the ***Helm*** case, the ***Cook*** and ***Mayfield*** cases, and the ***Goings*** case.

On September 21, 1992, Ms. Kline filed Plaintiff's First Amended Original Petition, which recounts the existence of the agreements and Ms. Kline's claim against Mr. O'Quinn for "the non-payment of money to her and failures to account to her." Ms. Kline's "Causes of Action" were stated as (1) a confirmation of the Award and (2) a breach of contract claim against Bank One. In her Prayer for Relief in Plaintiff's First Amended Original Petition, Ms. Kline sought confirmation of the Award and "actual damages with pre-judgment interest from Bank One." Hence, Plaintiff's First Amended Original Petition presented a cause of action only against Bank One.

It was only after the Trial Court ruled that the arbitrators exceeded their authority in attempting to award punitive damages and that Ms. Kline was not entitled to attorneys' fees in connection with having the Award confirmed, that Ms. Kline changed her position. At that point, Ms. Kline filed her Plaintiff's Second Amended Original Petition in this Cause. In this new pleading, Ms. Kline included a request for "punitive damages against Mr. O'Quinn due to his breach of fiduciary duty against her." In Mr. Riedmueller's October 22, 1992, letter to the Trial Court, he asserted that "the question of Ms. Kline's right to punitive damages against Mr. O'Quinn" remains. Despite this assertion, Ms. Kline's Second Amended Original Petition, and also her Third Amended Original Petition, failed

to raise any new claims against Mr. O'Quinn because they failed to plead any new *transaction.*

The *res judicata* effect of the Award bars any later claim by Ms. Kline for punitive damages or other relief based on that same conduct or factual *transaction*. This is because Texas has adopted the *transactional* view of *res judicata*. *See* ***Getty Oil Co. v. Insurance Co. of North America***, 845 S.W.2d 794, 798 (Tex. 1992), petition for cert. filed, 61 USLW 3836 (June 1, 1993); ***Barr v. Resolution Trust Corp.***, 837 S.W.2d 627, 631 (Tex. 1992). Under this view, a judgment on the plaintiff's underlying claims generally extinguishes all rights of the plaintiff to any and all remedies which may be available with respect to any part of the *transaction* which formed the basis for the first suit. In ***Barr***, the court emphasized that the determination of what constitutes the transaction at issue "requires an examination of the factual basis of the claim or claims in the prior litigation. It requires an analysis of the factual matters that make up this gist of the complaint, without regard to the form of action." ***Id.*** at 630. As detailed below, this view of *res judicata* applies to the Award and thus bars Ms. Kline's efforts to litigate the issues of punitive damages and attorney's fees.

The Arbitrators considered the relevant facts about the *transaction* at issue. Ms. Kline sued because of the non-payment of fees which were allegedly due her with respect to the cases in issue, *e.g.*, the ***Liberty Waste*** cases, the ***Helm*** case, the ***Cook*** and ***Mayfield*** cases, the ***Goings*** case, etc. Both Ms. Kline's Plaintiff's Original Petition and her Demand for Arbitration made clear that the relevant *transaction* at issue is the lack of payment of fees. Consequently, the Award is *res judicata* against whatever other remedies or relief Ms. Kline sought or could have sought against Mr. O'Quinn in connection with such *transaction*.

The Texas cases hold that an arbitration award has the same *res judicata* effect as a final judgment. ***Albert v. Albert***, 391 S.W.2d 186, 188-89 (Tex. Civ. App.--San Antonio 1965,

writ ref'd n.r.e.); ***Ferguson v. Ferguson***, 127 S.W.2d 1018, 1020-21 (Tex. Civ. App.--Eastland 1939, writ dism'd). In ***Albert***, the court applied the principle of *res judicata* to prevent a disappointed party from later seeking additional relief based on the underlying factual dispute which was the subject of an arbitration award. In ***Albert***, the arbitrators considered a dispute involving the dissolution and winding up of a partnership. After accepting the award, the disappointed party then sued for negligence. In holding that the new claim was barred, the court observed as follows:

> Once a valid award is made, it and the submission upon which it is founded are the sole basis for any further determination of the rights of the parties with respect to any demands embraced in the submission, for the latter are merged and extinguished in the award.

Albert, 391 S.W.2d at 189.

In ***Ferguson***, the court quoted a treatise on judgments as follows:

> The effect of a valid award upon the matters submitted to the arbitrators is equivalent, so far as the question of estoppel is concerned to, to the effect of a valid judgment . . . . Not only is the original cause of action merged in the award, if valid, and a subsequent action upon it barred, but it is likewise res adjudicata [sic] as to the matters directly in issue in subsequent litigation before [sic] the parties.

Ferguson, 127 S.W.2d at 1020-21; *accord* WILLIAM V. DORSANEO, 2 TEXAS LITIGATION GUIDE § 40.01[4] (1993); G. M. WILNER, DOMKE ON COMMERCIAL ARBITRATION § 31:02 (1984); RESTATEMENT (SECOND) OF JUDGMENTS § 84(1) (1982). Consequently, the Award itself precludes any further litigation of the transaction (i.e., the "disagreement" among Ms.

Kline and Mr. O'Quinn over the contingency fees) submitted to arbitration.

Ms. Kline never alleged a new *transaction*. She simply presented the same *transaction* (*i.e.*, the disagreement over contingent fee recovered with respect to the ***Liberty Waste*** cases, the ***Helm*** case, the ***Cook*** and ***Mayfield*** cases, the ***Goings*** case, etc.) and the same *claim* (*i.e.*, breach of alleged fiduciary duty) and then tacked on a request for punitive damages. Because this *same claim* with respect to this same *transaction* was presented to the Arbitrators, it cannot be presented again. *See, e.g.*, ***Barr***, 837 S.W.2d at 631; ***Albert***, 391 S.W.2d at 188-89; ***Ferguson***, 127 S.W.2d at 1020-21. Even if this particular *claim* had not been presented to the Arbitrators, it still would be barred because it pertains to the same *transaction* that Ms. Kline presented to the Arbitrators. *See* ***Barr***, 837 S.W.2d at 630. (*res judicata* analysis focuses on the "factual matters that make up the gist of the complaint, without regard to the form of action"). Consequently, the *res judicata* effect of the Award bars Ms. Kline from re-litigating the issue of punitive damages.

There is a vast difference between seeking review of an arbitration award versus seeking to re-litigate the *transaction* considered by the arbitrators. Indeed, the Texas General Arbitration Act specifically provides for proceedings to "confirm" an award, as well as to "modify" an award. *See* TEX. REV. CIV. STAT. ANN. arts. 236, 237, & 238 (Vernon 1973). Mr. O'Quinn's efforts to seek modification of the Award to set aside the punitive damages award, with which the Trial Court has agreed, do not undermine the *res judicata* effect of the Award. Indeed, Article 238(B) specifically provides that, if a request for modification of an award is granted, the court shall modify and correct the award and then confirm the modified award. This is exactly what the Trial Court did. Accordingly, the Final Judgment should be affirmed.

IV. If this Court decides that a new trial is appropriate, then Mr. O'Quinn should be entitled to additional discovery and a new trial:

At the pretrial conference in this Cause, the Trial Court relieved Ms. Kline of the obligation to answer and respond to Mr. O'Quinn's outstanding discovery requests. From the transcript of the pretrial hearing, it is clear that the Trial Court did so based upon her decision to allow Ms. Kline to go to trial only with respect to Bank One, not with respect to Mr. O'Quinn. Consequently, if the Court now concludes that Ms. Kline is entitled to a new trial against Mr. O'Quinn, Mr. O'Quinn should be entitled to pursue additional discovery from Ms. Kline.

In addition to precluding Mr. O'Quinn from discovery, the court also refused to allow Mr. O'Quinn's counsel to participate in the trial. When the trial began on December 21, the court ordered Mr. O'Quinn's counsel to leave counsel table and sit in the gallery. The court further ordered that Mr. O'Quinn's counsel refrain from objecting to the statements and testimony taken during the trial. Obviously, if Ms. Kline is entitled to go forward with a trial on her claim for punitive damages, Mr. O'Quinn is entitled to be heard.

Of course, the *Final Judgment* reflects the relief Mr. O'Quinn sought. Accordingly, if the *Final Judgment* below is affirmed by this Court, then Mr. O'Quinn believes that there is no further need for additional discovery or a new trial.

IV. Conclusions:

Contracting parties elect to submit their disputes to arbitration for the purpose of a private, speedy and fair resolution, without the delays and rigidities of a court trial. They expect the disputes to be submitted to arbitration to be contractual disputes arising out of the contract. They do not expect the arbitrators to award punitive damages, particularly when the

law does not allow the recovery of punitive damages for breach of contract.

It is one thing for contracting parties to submit to arbitration the issue of contractual compensatory damages, which are largely based on objective criteria. But punitive damages are entirely different. They are subjective and, as the New York Court of Appeals noted in ***Garrity***, take their shape from attitudes towards correction and reform. Because the award of punitive damages is so subjective, supervision by the courts is required. The need for supervision is heightened by virtue of the abbreviated discovery in arbitration (which can function to deny the defendant from developing the facts necessary to refute the plaintiff's allegations) and the fact that arbitrators historically do not adhere to the rules of evidence and are willing to listen to anything, no matter how irrelevant, emotional and prejudicial.

Because one of the underlying theories of arbitration is that there should be minimal court review and supervision, allowing arbitrators to award punitive damages will lead to unpredictable, uncontrolled, non-reviewable awards of punitive damages. This violates public policy concerns of the State, as well as fails to comply with the Due Process Clause of the United States and Texas Constitutions. The Trial Court's *Final Judgment* in this case eliminating the award of punitive damages against Mr. O'Quinn was thus entirely correct.

Should this Court conclude that policy and constitutional concerns do not require barring arbitrators completely from awarding punitive damages, those same concerns do, however, require that at the very least arbitrators may not award punitive damages except where the contracting parties have expressly granted them the authority to do so. Here the narrowly drawn contractual arbitration provision did not authorize the arbitrators to award punitive damages. The Trial Court's *Final Judgment* in this case eliminating the award of punitive damages against Mr. O'Quinn was entirely correct for the additional

reason that the arbitrators were not authorized to award punitive damages.

Moreover, this is a case in which the claimant did not properly lodge a claim for punitive damages. The intent of the parties that the arbitrators may not award punitive damages is reflected by the fact that Ms. Kline did not plead for such damages and presented no claim that would support the award of punitive damages. She sought only economic losses for breach of contract. It was only after the close of evidence that Ms. Kline's counsel (obviously believing he had successfully attacked Mr. O'Quinn), asked for such damages. Ms. Kline made this belated request even though Texas law does not allow the recovery of punitive damages under these circumstances. The Arbitrators, completely contrary to the law, nevertheless awarded such damages. This action by the Arbitrators exceeded their authority. It is respectfully submitted that the Trial Court was correct in modifying the Award to vacate the portion thereof where the Arbitrators exceeded their authority.

Mr. O'Quinn respectfully urges that the Trial Court's *Final Judgment* be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this BRIEF OF APPELLEE JOHN M. O'QUINN was served upon each of Donna C. Kline, Thomas J. Pearson, and Bank One, Texas, N.A., by mailing a copy of same via certified mail, return receipt requested, to their respective counsel of record as follows:

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This 13th day of September, 1993.

/s/ Steve Borgman

Supreme Court, U.S.
FILED

941729 APR 11 1995

OFFICE OF THE CLERK

No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

John M. O'Quinn, *Petitioner*,

v.

Donna C. Kline, *Respondent.*

Petition for Writ of Certiorari to the
Court of Appeals of Texas, Hosuton [14th District]

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

VOLUME 2

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NO. 14-93-00187-CV

DONNA C. KLINE,
Appellant,

vs.

JOHN M. O'QUINN
THOMAS J. PEARSON, and
BANK ONE, TEXAS, N.A.,
Appellees

IN THE COURT OF APPEALS FOR THE
FOURTEENTH DISTRICT OF TEXAS

MOTION FOR REHEARING OF APPELLEE
JOHN M. O'QUINN

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TO THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS:

COMES NOW Appellee John M. O'Quinn ("O'Quinn") and respectfully files this Motion for Rehearing. For the reasons set forth below, O'Quinn prays that this Court reconsider its Opinion of March 24, 1994, and upon rehearing **affirm** the Judgment granted below.

NAMES OF ALL PARTIES

Appellant:	Donna C. Kline
Appellant's Counsel:	Norman Riedmueller Michael Pullara
Appellee:	John M. O'Quinn
Appellee's Counsel:	J. Clark Martin Steven R. Borgman Vinson & Elkins L.L.P.
Appellee:	Thomas J. Pearson
Appellee's Counsel:	Thomas J. Pearson & Associates Pro se
Appellee:	Bank One, Texas, N.A.
Appellee's Counsel:	Cheryl E. Irvin Irvin, Clark & Burnett

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MOTION FOR REHEARING

TO THE HONORABLE JUSTICES OF THE COURT OF APPEALS:

COMES NOW John M. O'Quinn ("Mr. O'Quinn"), Appellee and Defendant in the Trial Court, who respectfully files this his Motion for Rehearing of this Court's Opinion and Judgment of March 24, 1994. Mr. O'Quinn would respectfully show the Court as follows:

COMPELLING REASONS FOR REHEARING

Despite holding that Mr. O'Quinn did not owe Appellant Ms. Donna Kline ("Ms. Kline") a fiduciary duty and the absence of any implied tort duty of good faith and fair dealing under well-settled law, the majority nonetheless affirms the arbitrator's award of punitive damages in a contract dispute. This result is contrary to well-settled law and underscores the reasons why a rehearing is particularly appropriate. As detailed below, this Court erred in several important respects in concluding that the Trial Court incorrectly set aside the arbitrators' award of punitive damages.

Among other things, this Court's holding that Mr. O'Quinn waived his constitutional arguments is incorrect. As the Appellee, Mr. O'Quinn was not required to raise every possible alternative theory on which the trial court's judgment could be based. *E.g.*, ***Williams v. Khalaf***, 802 S.W.2d 651, 650 (Tex. 1990). Accordingly, Mr. O'Quinn's constitutional arguments are properly before this Court. Mr. O'Quinn respectfully requests that this Court reconsider these issues.

As detailed in Mr. O'Quinn's earlier briefs filed with this Court, both the U.S. and Texas constitutions impose limitations on awards of punitive damages. The most notable cases limiting awards of punitive damages are ***TXO Production Corp. v. Alliance Resources Corp.***, 113 S. Ct. 2711 (1993); ***Pacific Mut. Life Ins. Co. v. Haslip***, 499 U.S. 1 (1991); and ***Transportation Ins. Co. v. Moriel***, 37 Tex. S. Ct. J. 450 (Feb. 2, 1994). All three of these decisions recognize that certain safeguards must be imposed on the process by which punitive damages are awarded. Despite these decisions and the limitations on punitive awards, this Court's Opinion avoids an analysis of the application of the constitutional limitations on arbitration awards of punitive damages. As detailed below, arbitration proceedings have none of the constitutional safeguards found so important in ***Moriel, TXO,*** and ***Haslip***. Hence, the award of punitive damages by the arbitrators in this case violates the U.S. and Texas constitutions.

This Court also erred in failing to prohibit arbitrators from awarding punitive damages unless the parties specifically agree to give the arbitrators the authority to do so. In its opinion, the Court acknowledged this argument, but nonetheless declined to affirm the Trial Court's Judgment. For the reasons detailed in ***Garrity v. Lyle Stuart, Inc.***, 386 N.Y.S.2d 831, 353 N.E.2d 793 (N.Y. 1976), the public policy of the State of Texas should prohibit awards of punitive damages in arbitration proceedings unless the parties have expressly agreed to submit the issue of punitive damages to arbitration. It is important to note that the Texas Supreme Court's discussion of punitive damages in ***Moriel*** is quite similar to the views expressed by the New York Court of Appeals in ***Garrity***.

This Court's opinion also is in error in connection with the Court's conclusion that the parties in this case

contemplated the arbitration of tort claims and an award of punitive damages. There is nothing whatsoever in the agreements among the parties involving punitive damages. Hence this case is not like ***Grissom v. Greener & Sumner Constr. Co.***, 676 S.W.2d 709 (Tex. App.--El Paso 1984, writ ref'd n.r.e.), where the parties expressly agreed to submit the issue of exemplary damages to arbitration. Moreover, the arbitration clause at issue was narrowly drawn. Hence, arbitration of tort claims was outside the scope of the parties' agreement. *See* ***Central Texas Clarklift, Inc. v. Simmons***, 540 S.W.2d 745 (Tex. Civ. App.--Waco 1976, no writ).

In its Opinion, this Court incorrectly focused on the procedural issues relating to arbitration, relying on ***USX Corp. v. West***, 781 S.W.2d 453 (Tex. App. -- Houston [1st Dist.] 1989, no writ); ***John Wiley & Sons, Inc. v. Livingston***, 376 U.S. 543 (1964); and ***Del E. Webb Constr. v. Richardson Hosp. Auth.***, 823 F.2d 145 (5th Cir. 1987). As detailed below, however, ***John Wiley***, ***Del Webb***, and ***USX*** involved a question not at issue here. Those cases involved the question of whether the procedural steps set forth in the parties' agreement as preconditions to arbitration had been satisfied. This case raises a quite different issue -- was the question of punitive damages submitted? As detailed below, Articles 237 and 238 of the Texas General Arbitration Act *require* the Texas courts to determine whether the arbitration exceeded the scope of their authority and whether they awarded on a matter not submitted to them.

This Court's presumption of evidence to support the arbitrators' award of punitive damages is in error. As pointed out in Justice Ellis's dissent, the single case cited by the majority for this presumption actually created the presumption itself, as the Texas Supreme Court decision cited in ***House Grain Co. v. Obst***, 658 S.W.2d 903, 906 (Tex.

App.--Corpus Christi 1983, writ ref'd n.r.e.), fails to support the use of any presumption of evidence to support an arbitration award. This Court's reliance on ***Obst*** is in error, as this Court should instead presume the exact opposite -- that the evidence supports the Trial Court's Judgment. *See, e.g.*, ***Christiansen v. Prezelski***, 782 S.W.2d 842, 843 (Tex. 1990); ***Atrium Westwood VIII Venture v. Barrick Westwood L.P.***, 693 S.W.2d 699 (Tex. App.--Houston [14th Dist.] 1985, no writ); TEX. R. APP. P. 50(d). As an appellant, the presumption runs against Ms. Kline, not in her favor.

For these and the reasons detailed below, Mr. O'Quinn respectfully requests that this Court rehear and reconsider its Opinion and, upon rehearing, affirm the Trial Court's Judgment in all respects.

POINTS OF ERROR ON REHEARING

1. This Court erred in reversing the Trial Court's Judgment, which modified the arbitration award to exclude punitive damages from the award. (Op. at 6-12.)

2. This Court erred in holding that Mr. O'Quinn's constitutional arguments were waived. (Op. at 11.)

3. This Court erred in holding that the arbitration award of punitive damages may be affirmed without violating the U.S. or Texas constitutions. (Op. at 11.)

4. This Court erred in failing to adopt and apply as the public policy of Texas a rule that prohibits arbitrators from awarding punitive damages unless the parties have specifically and expressly agreed to give the arbitrators the authority to award such relief. (Op. at 11-12.)

5. This Court erred in reversing the Trial Court's Judgment and awarding punitive damages because there is absolutely no legal basis for an award of punitive damages in this case. (Op. at 6-12 & 14-18.)

6. This Court erred in concluding that the parties agreed to the arbitration of tort claims and especially claims for punitive damages. (Op. at 7-10.)

7. This Court erred in concluding that the award of punitive damages was within the scope of the arbitrators' authority. (Op. at 6-10.)

8. This Court erred in deferring to the arbitrators on the question of whether Ms. Kline's pleadings requested punitive damages, as the Texas General Arbitration Act requires the modification of the award because punitive damages were not submitted. (Op. at 8-10.)

9. This Court erred in presuming that the evidence before the arbitrators supported an award of punitive damages. (Op. at 10.)

ARGUMENT AND AUTHORITIES

I. Arbitrators should not be allowed to award punitive damages: (Germane to Point of Error on Rehearing Nos. 1, 3 & 4)

There are two fundamental reasons why arbitrators should not be allowed to award punitive damages in arbitration proceedings conducted pursuant to the Texas General Arbitration Act. First, arbitration proceedings lack the substantive and procedural safeguards required by the Due Process Clause of the United States Constitution and the Due Course of Law Clause of the Texas Constitution.

Second, allowing Arbitrators to award punitive damages is contrary to the public policies of this State. For the reasons discussed below, this Court should therefore affirm the Trial Court's Judgment.

A. O'Quinn did not waive his constitutional rights or the constitutional arguments against allowing arbitrators to award punitive damages: (Germane to Point of Error on Rehearing No. 2)

On page 11 of its decision, this Court concluded that Mr. O'Quinn waived his arguments that the United States and Texas Constitutions preclude the award of punitive damages in this case. Mr. O'Quinn respectfully disagrees. As the Appellee, Mr. O'Quinn was not required to argue every alternative theory on which the Trial Court could have based its decision. ***Williams v. Khalaf***, 802 S.W.2d 651, 658 (Tex. 1990); ***Boyce Iron Works, Inc. v. Southwestern Bell Tel. Co.***, 747 S.W.2d 785, 787 (Tex. 1988). The Texas Supreme Court described this rule in ***Wiiliams***:

> Before the reversal by the court of appeals, Williams had obtained a totally favorable judgment with which he was satisfied. In supporting the trial court's action in his Brief to the court of appeals, Williams was under no obligation to argue every alternative theory on which the trial court could base its action. [citation to ***Boyce Iron Works*** omitted].

Williams, 802 S.W.2d at 658; ***Oak Park Townhouses v. Brazosport Bank of Texas, N.A.***, 851 S.W.2d 189, 190 (Tex. 1993)(per curiam). These decisions from the Texas Supreme Court make it clear that an appellee has not waived an

alternative basis for supporting the Trial Court's decision simply because appellee did not make the alternative below.

At the first hearing involving the arbitration award, the Trial Court ruled from the bench in favor of Mr. O'Quinn. As detailed in Mr. O'Quinn's earlier briefs, the Trial Court reaffirmed this ruling on several occasions, including at the pretrial conference. Given the Trial Court's rulings, there was no reason for Mr. O'Quinn to assert additional and alternative arguments to support the Trial Court's ruling. As in ***Williams*** and in ***Boyce Iron Works***, Mr. O'Quinn may now raise these alternative grounds for the Trial Court's ruling on appeal. Because these additional grounds for affirmance involve important and fundamental rights under the U.S. and Texas constitutions, it is important for this Court to resolve these issues.

As authority for its conclusion that Mr. O'Quinn waived his constitutional arguments, the Court cites ***Johnson v. Lynaugh***, 800 S.W.2d 936, 939 (Tex. App. -- Houston [14th Dist.] 1990, writ denied). However, ***Johnson*** involved waiver by an appellant, not an *appellee*. Mr. O'Quinn respectfully submits that ***Johnson*** simply does not apply here. Instead, ***Williams*** and ***Boyce Iron Works*** apply. Consequently, Mr. O'Quinn's constitutional arguments regarding the ability of arbitrators to award punitive damages are properly before this Court.

B. Because arbitration proceedings do not comply with constitutional limitations on awards of punitive damages, arbitrators should not be permitted to award punitive damages: (Germane to Point of Error on Rehearing No. 3)

The concept of punitive damages has its roots in the English common law and was recognized in early American jurisprudence. Over the past two centuries, courts in our country and in the State of Texas have summarily found that punitive damage awards are constitutional. Only recently has the United States Supreme Court examined the constitutionality of punitive damage awards in the light of Due Process requirements -- both procedural and substantive -- of the Fourteenth Amendment to the United States Constitution. These decisions by the Supreme Court are extremely important because Due Process of law applies to arbitration proceedings; the parties do not waive their right to Due Process of law simply by agreeing that their disputes will be submitted to arbitration.

1. The United States Supreme Court's decisions in *Haslip* and *TXO* demonstrate the constitutional requirement of safeguards on awards of punitive damages:

In ***Pacific Mutual Life Ins. Co. v. Haslip***, 111 S. Ct. 1032 (1991), the Supreme Court held that the common law method for assessing punitive damages is not so inherently unfair as to deny Due Process and to be *per se* unconstitutional. The Court went on to hold, however, that unlimited jury discretion -- or unlimited judicial discretion for that matter -- in fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities. ***Id.*** at 1043. The Court held that it need not, and indeed, cannot draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. The Court said it could, however, say with certainty that general concerns of reasonableness and adequate guidance from the trial court when a case is tried to a jury properly enter into the constitutional calculus. ***Id.*** at 1043.

The Supreme Court in ***Haslip*** indicated that the jury's discretion with respect to punitive damages is constitutional only when a trial court gives the jury reasonable and adequate guidance in making such awards. The Supreme Court noted that under Alabama law, as under the law of most states, punitive damages are imposed for purposes of retribution and deterrence, not to compensate the plaintiff for any injury. The Court observed that the instructions in ***Haslip*** informed the jury that its discretion should be guided by this purpose. ***Id.*** at 1044.

In addition, the Supreme Court in ***Haslip*** indicated that punitive damages are constitutional only when the instructions given to the jury describe the standards to be used by the jury in determining whether to impose such awards. Although juries are given significant discretion in the determination of punitive damages, that discretion is not unlimited. In ***Haslip***, the Court found that the jury's discretion was confined by appropriate instructions to deterrence and retribution and the state policy concerns sought to be advanced. ***Id.*** at 1044. The Court found that the jury was instructed that if punitive damages were to be awarded, the jury "must take into consideration the character and degree of the wrong as shown by the evidence and necessity of preventing similar wrong." ***Id.*** at 1044.

The Supreme Court in ***Haslip*** held that the discretion vested in the jury under the traditional common law rules may be justified as constitutional by the existence of post-trial procedures for scrutinizing punitive damage awards. ***Id.*** at 1044. In ***Haslip***, the Court indicated that the procedures established by the Alabama courts ensured meaningful and adequate review by the trial court whenever a jury fixed the amount of punitive damages. The Court noted that the Supreme Court of Alabama had established post-trial procedures for scrutinizing awards of punitive damages. Under this procedure, Alabama trial courts must state in the record the reasons for interfering with a jury verdict, or refusing to interfere with a jury verdict, on grounds of excessiveness of the damages. Among the factors deemed appropriate for an Alabama trial court's consideration are: (1) the culpability of the defendant's conduct, (2) the desirability of discouraging others from similar conduct, (3) the impact upon the parties, and (4) other factors, such as the impact on innocent third parties. ***Id.*** at 1044. The United States Supreme Court held that this test ensures

meaningful and adequate review by the Trial Court whenever a jury has fixed the punitive damages. ***Id.*** at 1044.

The Court went on to state that the appellate procedures established by the Alabama Supreme Court provide still an additional check on the jury's or trial court's discretion in awarding punitive damages. ***Id.*** at 1045. Under these Alabama procedures, the reviewing court first undertakes a comparative analysis and then it applies detailed substantive standards the Alabama Supreme Court has developed for evaluating punitive awards. In so doing, it makes its review to ensure that the award does not exceed an amount that will accomplish society's goal of punishing and deterrence. ***Id.*** at 1045. The Court noted that this appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition. The United States Supreme Court noted that the Supreme Court of Alabama has elaborated and refined specific criteria for determining whether a punitive award is reasonably related to the goals of deterrence and retribution. ***Id.*** at 1045.

The Court concluded that the application of these standards imposes a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages. The Supreme Court held that these standards have real effect when applied by the Alabama Supreme Court to jury awards. The Supreme Court noted that these standards have resulted in the reduction of punitive awards in Alabama and that they provide for a rational relationship in determining whether a particular award is greater than necessary to punish and deter. 111 S.Ct. 1045-46.

In ***TXO Production Corp. v. Alliance Resources Corp.***, 113 S. Ct. 2711 (1993), the United States Supreme Court again reviewed the limits imposed by the Due Process Clause of the Fourteenth Amendment upon the award of punitive damages. The Court concluded that because West Virginia law requires as a matter of fundamental fairness that punitive damages bear a reasonable relationship to compensatory damages or the magnitude of the potential harm that defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as to the possible harm to the other victims that might have resulted if similar future behavior were not deterred, there was sufficient concern by the West Virginia trial courts with the reasonableness of the award such that the award did not violate the substantive component of the Due Process Clause. ***Id.*** at 2720-721.

Turning to the procedural component of the due process clause, the Court indicated that the inquiry could include whether the punitive damages award is a result of a fundamentally unfair procedure because the jury was not adequately instructed, whether the award was adequately reviewed by the trial or appellate courts, and whether the defendant had no advance notice that the jury might be allowed to return such a large award or to rely on potential harm as a basis for its calculation. The Court declined to address the first argument as it was not argued or passed on below. The Court concluded that in fact the jury's award was adequately reviewed by the trial court and the appellate court and that defendant had notice under prior law that punitive damages could be awarded under the circumstances of the case. Thus, the United States Supreme Court found no procedural violation of Due Process as a result of the procedures used in West Virginia for the awarding of punitive damages. ***Id.*** at 2720-724.

2. The Texas Supreme Court's decision in *Moriel* also demonstrates the importance of safeguards on awards of punitive damages:

The Texas Constitution contains its own Due Process Clause. TEX. CONST. art I, § 19. In the last several years, the Texas courts have dealt with the constitutionality of awards of punitive damages. *See, e.g.,* ***Browning-Ferris Indus., Inc. v. Lieck***, 845 S.W.2d 926 (Tex. App.--Corpus Christi 1993, writ granted); ***Prudential Ins. Co. of Am. v. Jefferson Associates, Ltd.***, 839 S.W.2d 866, 876-77 (Tex. App.--Austin 1992, writ granted). In ***Jefferson Associates***, for example, the Court of Appeals for Austin held that a jury's award of punitive damages did not violate the Due Process Clause of the United States Constitution or the Texas Constitution because many of the judicial safeguards relied upon in ***Haslip*** are applicable in the Texas state courts. The Court of Appeals noted that the opportunity for review by a trial court is available by both the trial court and the appellate courts.

The Texas Supreme Court recently addressed the imposition of punitive damages. ***Transportation Ins. Co. v. Moriel***, 37 Tex. Sup. Ct. J. 450 (Feb. 2, 1994). In ***Moriel***, the Texas Supreme Court recognized that *punitive damages* have many of the characteristics and attributes that were the basis for the New York Court of Appeals' decision in ***Garrity v. Lyle Stuart, Inc.***, 353 N.E.2d 793 (1976). The Court noted at several places in its opinion that there is a close connection between punitive damages and the criminal law. *See* ***Moriel***, 37 Tex. Sup. Ct. J. at 454, 457. The Texas Supreme Court also noted in ***Moriel*** that the U.S.

constitution imposes certain limitations on awards of punitive damages. ***Id.*** at 463-465.

In ***Moriel***, the Texas Supreme Court declined to declare unconstitutional or otherwise change the principle that its review of punitive damage awards extends only to determining whether the evidence supporting the award was *legally sufficient*. ***Id.*** at 461.[1/] The Texas Supreme Court in ***Moriel*** held that the evidence presented by Moriel was *legally sufficient* to sustain the judgment that the insurer acted without any reasonable basis in delaying the payment of the claim and thus was liable in tort for breach of the duty of good faith and fair dealing. The Court held, however, that under the clarified definition of *gross negligence*, the insurer cannot be held liable for *punitive damages* unless there is also *legally sufficient* evidence (a) that the defendant's conduct created an *extreme risk of harm*, and (b) that the defendant was consciously indifferent to this *extreme risk of harm* or was actually aware of this *extreme risk of harm*. ***Id.*** at 462.

The Texas Supreme Court in ***Moriel*** expressly stated that because the plaintiff did not present legally sufficient evidence of *gross negligence*, the Constitutional issues (*e.g.*, whether the size of the punitive damages award or whether the procedures followed by the trial court violated the defendant's Due Process rights) remained open questions.

1/ As will become apparent from the following discussion, the future evolution of the Due Process protections against excessive and inappropriate punitive damage awards by the U.S. Supreme Court may well require a change in the way Texas courts review punitive damage awards.

Nevertheless, in remanding the case for a new trial, the Texas Supreme Court reviewed the Constitutional Due Process analyses in ***Pacific Mutual Life Ins. Co. v. Haslip***, 499 U.S. 1 (1991), and in ***TXO Prod. Corp. v. Alliance Resources Corp.***, 113 S.Ct. 2711 (1993). The Texas Supreme Court also noted that the Supreme Court has now granted writs in still another case, ***Oberg v. Honda Motor Co.***, 851 P.2d 1084 (Or. 1993), *cert. granted*, 62 U.S.L.W. 3470 (U.S. Jan. 14, 1994), involving Due Process limitations on the awards of punitive damages. Although the Texas Supreme Court did not explicitly rule on the Constitutional issues, it is significant that the Court chose to create additional *common law* safeguards.

The Texas Supreme Court in ***Moriel*** first focused on the Texas state court procedures for awarding punitive damages at the trial court level. The Court noted that at the trial court level, the jury instructions used in the trial of the ***Moriel*** case, which appear to have been based upon the Texas pattern jury charge and ***Alamo National Bank v. Kraus***, 616 S.W.2d 908, 910 (Tex. 1981), were more comprehensive than those analyzed by the United States Supreme Court in ***Haslip*** and thus would presumably pass scrutiny under the United States Constitution. 37 Tex. Sup. Ct. J. at 463, n. 21.

Constitutional standards also involve post-verdict procedures for scrutinizing the jury's award of punitive damages. This is clearly so at the Trial Court level. While the Supreme Court indicated in ***Haslip*** and ***TXO*** that such post-verdict procedures *should* also exist at the appellate level, undersigned counsel respectfully predicts that the Supreme Court will hold in ***Oberg*** that such procedures must also exist at the appellate level. In ***Moriel***, the Texas Supreme Court noted that the Supreme Court in ***Haslip*** emphasized a post-verdict procedure where the trial courts are required to scrutinize punitive damage awards, reflecting

on the record their reason for upholding or refusing to uphold the award, ***Moriel***, 37 Tex. Sup. Ct. J. at 463, and also emphasized the fact that the appellate review in Alabama provides an additional check on the jury's or trial court's discretion. ***Id.*** at 463. The Texas Supreme Court observed that, by contrast, in Texas a defendant *may* obtain trial court review of a punitive damage award by filing a motion for new trial, but there is no requirement for the trial courts to scrutinize each award and set forth reasons on the record for refusing to disturb a jury's verdict. ***Id.*** at 464. Indeed, Texas trial courts are not even required to rule on a motion for new trial; they may ignore the motion and passage of time will serve to overrule the new trial motion by operation of law. ***Id.*** at 464.

Moving further up the ladder of post-verdict review, the Texas courts of appeal may overturn the jury's verdict and order the case retried only if the verdict is so against the great weight and preponderance of the evidence as to be manifestly unjust. ***Id.*** at 464. Finally, the Texas Supreme Court, unlike its counterparts in Alabama and West Virginia and most other States, is precluded from reviewing the evidence supporting a punitive damage award for factual sufficiency. ***Id.*** at 464. The Texas Supreme Court in ***Moriel*** concluded that under Texas procedures, the evidence supporting a punitive damage award is scrutinized less closely on appeal than in some other states. ***Id.*** at 464. Indeed, the Court stated that many aspects of the procedures employed up to now by Texas courts do not compare favorably to those examined in ***Haslip*** and ***TXO***. ***Id.*** at 464.

Recognizing, as has New York's highest court in ***Garrity***, the close connection between punitive damages and the criminal law, the Texas Supreme Court stated that punitive damages are proper only in the <u>most</u> <u>exceptional</u> cases and

that the jury discretion which is the hallmark of the common law punitive damage system **must** be complemented by procedural safeguards that will ensure against (i) excessive or (ii) *otherwise inappropriate* awards. (emphasis added.) ***Id.*** at 464-465. The Court concluded that the Texas procedures for assessing and reviewing punitive damage awards, both at the trial and appellate levels, in some respects may not adequately ensure that such awards are not grossly out of proportion of the severity of the offense and have some understandable relationship to compensatory damages. ***Id.*** at 465.

In an effort to address these shortcomings, the Texas Supreme Court articulated procedural standards for the Trial Courts in this State to apply with respect to claims for *punitive damages*. Without reaching the constitutional questions, the Court announced, pursuant to its authority under the common law (the same foundation used by the New York Court of Appeals in ***Garrity*** and other courts[2/]), two changes in the procedures by which punitive damages may be awarded in the Texas state courts. The changes are:

a. The issue as to the amount of punitive damages must be bifurcated from the remaining issues in the trial of the Cause. 37 Tex. Sup. Ct. J. at 465-66. The Court noted that thirteen other States already require bifurcation of trials in which punitive damages are sought. ***Id.*** at 465-

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2/ ***See Shaw v. Kuhnel & Associates, Inc.***, 698 P.2d 880 (N.M. 1985); ***United States Fidelity & Guaranty Co. v. DeFluiter***, 456 N.E.2d 429 (Ind. Ct. App. 1983); ***School City of East Chicago, Indiana v. East Chicago Federation of Teachers***, 422 N.E.2d 656 (Ind. Ct. App. 1981).

66. The Court held the issue is not whether bifurcation is Constitutionally required, but whether the Texas system of imposing punitive damages provides adequate procedural safeguards to protect against awards that are grossly excessive. Concluding that the current procedures are not adequate, the Court adopted the requirement of bifurcated trials in punitive damages cases.

b. The courts of appeal are already obligated, when reversing a jury's award on insufficiency grounds, to detail the evidence in their opinions and explain why the jury's finding is factually insufficient or so against the great weight and preponderance of the evidence as to be manifestly unjust. ***Pool v. Ford Motor Co.***, 715 S.W.2d 629, 635 (Tex. 1986). The Texas Supreme Court in ***Moriel*** extended this obligation. Now, the reviewing courts of appeal are also obligated to detail the evidence in their opinions when they are affirming an award of punitive damages over a challenge that it is based on insufficient evidence or against the great weight and preponderance of the evidence. The Texas Supreme Court held that this procedure will ensure careful appellate review of the punitive award and allow the Texas Supreme Court to determine whether the court of appeals correctly applied the ***Kraus*** factors. 37 Tex. Sup. Ct. J. at 466.

If the U.S. Supreme Court in ***Oberg*** mandates appellate review of a jury's award of punitive damages, additional changes to the Texas procedures may be needed to ensure

against excessive or otherwise inappropriate punitive damage awards.

3. The safeguards emphasized by the U.S. Supreme Court and the Texas Supreme Court in *TXO*, *Haslip*, and *Moriel* are completely absent from arbitration proceedings:

There is nothing in an arbitration proceeding to ensure against excessive or otherwise inappropriate punitive damage awards. None of the protections -- not a single one -- discussed by the Supreme Court in ***Haslip*** and ***TXO***, or discussed and required by the Texas Supreme Court in ***Moriel***, is present in an arbitration proceeding. There is no voir dire of the potential arbitrators to determine their biases against the defendant or their feelings as to the award of punitive damages. Discovery is abbreviated, which can result in the defendant being denied the opportunity to develop the facts necessary to refute the plaintiff's allegations. There are few evidentiary rules applicable to an arbitration proceeding; virtually everything is admissible into evidence. Hence, there is no procedure for controlling and limiting the evidence submitted to the Arbitrators and the statements made by the parties and their advocates to the Arbitrators. Virtually anything can be done or said during an arbitration hearing -- and apparently was in this case. Emotional and prejudicial testimony that would never be admitted into evidence by a trial court in a jury trial will usually be considered by arbitrators. There is often no transcript and thus there is no mechanism for the trial court or appellate courts to determine what evidence was considered by the arbitrators.

There is no procedure whereby the arbitrators are provided, either by the Trial Court or the American

Arbitration Association or some other supervising organization, instructions that articulate the purposes of punitive damages. Unlike juries, arbitrators are not instructed that punitive damages are to punish and to deter the defendant, nor are arbitrators instructed as to when and under what circumstances the law allows the award of punitive damages.

Because punitive damages are so subjective, the U.S. and Texas constitutions require supervision by the trial or appellate courts. However, one of the underlying theories of arbitration is that there should be minimal court review and supervision. Because there is rarely a record of the arbitration proceedings, arbitrators sometimes choose not to state their reasoning or the bases for their decision, making it is almost impossible for reviewing courts to supervise the proceedings or the arbitrators' award. While this seems acceptable for compensatory damages, allowing arbitrators to award *punitive* damages will lead to unpredictable, uncontrollable, nonreviewable awards of punitive damages.

There is no procedure applicable to arbitration awards for the trial court or the appellate courts to review the testimony and documents considered by the arbitrators or the basis on which the arbitrators made their award of punitive damages. Similarly, there is no procedure for the trial court or the appellate court to determine whether the award of punitive damages by the arbitrators is excessive taking into account the factors articulated by the Texas Supreme Court: (i) whether the exemplary damages are reasonably proportional to actual damages, (ii) the nature of the wrong, (iii) the character of the conduct involved, (iv) the culpability of the wrongdoer, (v) the situation and sensibilities of the parties, and (vi) the extent to which the wrongful conduct offends a public sense of justice and

propriety. *See, e.g.*, ***Alamo National Bank v. Kraus***, 616 S.W.2d 908, 910 (Tex. 1981).

Perhaps most disturbing of all in this case is the fact that Ms. Kline did not even lodge a claim for punitive damages. The intent of the parties that the arbitrators may not award punitive damages is reflected by the fact that Ms. Kline did not plead for such damages and presented no claim that would support the award of punitive damages. She sought only economic losses for breach of contract. It was only after the close of evidence that Ms. Kline's counsel (obviously believing he had successfully attacked Mr. O'Quinn) asked for such damages. Ms. Kline made this belated request even though Texas law does not allow the recovery of punitive damages under these circumstances. The Arbitrators, completely contrary to the law, awarded such damages. This action by the Arbitrators exceeded their authority. The Trial Court was correct in modifying the Award to vacate the portion thereof where the Arbitrators exceeded their authority.

Arbitration is entirely consensual. Unless there is a *contract* containing an arbitration provision, there is no arbitration. *Contracting* parties elect to submit their future disputes to arbitration for the purpose of a private, speedy and fair resolution, without the delays and rigidities of a court trial. They expect their arbitrators to award the type of relief that the law allows for breach of *contract*. They do not expect the arbitrators to award punitive damages, particularly when the law does not allow the recovery of punitive damages for *breach of contract*.

It is one thing for *contracting* parties to submit to arbitration the issue of *contractual* **compensatory** damages, which are largely based on objective criteria. But **punitive** damages are entirely different. Punitive damages are

subjective and, as the Texas Supreme Court held in ***Moriel***, the jury discretion that is the hallmark of the common law punitive damage system **must** be complemented by procedural safeguards that will ensure against excessive or otherwise inappropriate awards. It is inconceivable, and simply cannot be the case, that when parties submit their *contractual* disputes to arbitration they face the risk of having punitive damages awarded against them in the complete absence of substantive and procedural safeguards to ensure against excessive or otherwise inappropriate punitive damage awards. Parties do not "waive" these significant substantive and procedural rights simply by agreeing that their future *contract* disputes will be resolved by arbitration.

As the New York Court of Appeals recognized in ***Garrity***, arbitrators function in a system completely devoid of any of the safeguards required to ensure against excessive or inappropriate awards of punitive damages. Hence, arbitrators should not be allowed to award punitive damages. Should this Court conclude, however, that the policy and constitutional concerns do not require barring arbitrators completely from awarding punitive damages, those same concerns at the very least require that arbitrators may not award punitive damages except where the contracting parties have expressly granted them the authority to do so. ***See Grissom v. Greener & Sumner Constr. Co.***, 676 S.W.2d 709 (Tex. App.--El Paso 1984, writ ref'd n.r.e.) (affirming arbitration award of punitive damages where the parties expressly agreed to submit this issue to arbitration). A rule disallowing punitive damages in arbitration unless the parties have expressly agreed otherwise is consistent with the constitutional limitations of ***TXO***, ***Haslip***, and ***Moriel***, yet is also consistent with ***Grissom***. It is simply not realistic, and certainly not in the best interest of encouraging arbitration, to assume that when parties agree to arbitrate future

disputes arising out of their contract they thereby "waive" all of the various Constitutional and public policy protections afforded by the law.

In this case, the safeguards imposed by the legal system on the arbitration proceedings simply fail to satisfy the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Due Course of Law provision of the Texas Constitution. As such, the Trial Court's decision to modify the Award to eliminate the punitive damages purportedly imposed on Mr. O'Quinn was correct because the award of punitive damages violated the Due Process Clauses of the United States and Texas Constitutions. Accordingly, Mr. O'Quinn requests that this Court reconsider and rehear its Opinion and, upon reconsideration, affirm the Judgment of the Trial Court.

C. Arbitrators should not be permitted to award punitive damages as a matter of public policy: (Germane to Point of Error on Rehearing No. 4)

Even if this Court concludes that arbitration proceedings are constitutionally acceptable, this Court should hold that public policy considerations prohibit arbitrators from awarding punitive damages, at least unless the parties have otherwise expressly agreed. In ***Garrity v. Lyle Stuart, Inc.***, 353 N.E.2d 793 (1976), the New York Court of Appeals examined this precise issue. The Court of Appeals held, not on constitutional grounds, but as a matter of public policy, that an arbitrator has no power to award punitive damages, even if the parties had attempted to bestow that power on the arbitrator. The court held that punitive damages is a sanction reserved to the state, a public policy of such magnitude as to call for judicial intrusion to prevent its contravention. ***Id.*** at 794. Because enforcement

of an award of punitive damages as a purely private remedy would violate strong public policy, the New York Court of Appeals held that an arbitrator's award which imposes punitive damages should be vacated. ***Id.*** at 794.

The factors considered by the New York Court of Appeals which constituted the bases for its conclusion were:

> (1) At common law, punitive damages are available only in a limited number of instances. Punitive damages are allowed in cases where the wrong complained of is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant, but to deter him, as well as others who might otherwise be so prompted, from indulging in similar conduct in the future. It is a so-called exemplary "remedy," not a private compensatory remedy. ***Id.*** at 795.
>
> (2) Punitive damages are not available for mere breach of contract, for in such a case, only a private wrong and not a public right is involved. ***Id.*** at 795. Even if there was a so-called "malicious" breach of the contract, that would not permit the imposition of punitive damages. Punitive sanctions are reserved to the State. This is a public policy of such magnitude as to call for judicial intrusion. ***Id.*** at 796.
>
> (3) The evil of permitting an arbitrator, whose selection is often restricted or can be manipulated by the party in a superior bargaining position, to award punitive damages is that it displaces the court and the jury, and therefore the State, as the engine for imposing a social sanction. Actual damages are measurable against some

objective standard. But punitive damages take their shape from the subjective criteria involved in attitudes toward correction and reform, and courts do not readily accept the delegation of that kind of power. Where punitive damages have been allowed for those torts which are still regarded somewhat as public penal wrongs, as well as actionable private wrongs, they have rather close judicial supervision. ***Id.*** at 796.

(4) Standards, such as whether the award of punitive damages was irrational or unjust, are subjective and afford no practical guidelines for the arbitrator and little protection against abuse. Moreover, even if such standards were imposed on the arbitration proceeding in an effort to install fairness to the system, the imposition of the standards would be contrary to the sound development of arbitration law. ***Id.*** at 796.

(5) The parties to arbitration agree to the substitution of a private tribunal for purposes of deciding their disputes without the expense, delay, and rigidities of traditional courts. If arbitrators are allowed to impose punitive damages, the usefulness of arbitration will be destroyed. It will become a trap for the unwary, given the eminently desirable freedom from judicial overview of law and facts. It would mean that the scope of the determination by arbitrators, by the license to award punitive damages, would be both unpredictable and uncontrollable. ***Id.*** at 796.

(6) In imposing penal sanctions in private arrangements, a tradition of the rule of law in organized society is violated. One purpose of

> the rule of law is to require that the use of coercion be controlled by the State. In a highly developed commercial and economic society, the use of private force is not the danger, but the uncontrolled use of coercive economic sanctions in private arrangements is. The power to punish is a monopoly of the State and not that of any private individual. ***Id.*** at 796-797.
>
> (7) The parties usually never agreed, or, for that matter, even consider punitive damages as a possible sanction for breach of an agreement. Even if the parties had sought to agree that the arbitrators could award punitive damages, the law does not and should not permit private persons to submit themselves to punitive sanctions of the order reserved to the State. The freedom of contract does not embrace the freedom to punish, even by contract. ***Id.*** at 797.
>
> (8) Under common law principles, there is eventual supervision of jury awards of punitive damages, in the singularly rare cases where they are permitted, by the trial court's power to change awards and by the appellate court's power to modify such awards.

Other states have adopted this same holding for public policy reasons. For example, in ***Shaw v. Kuhnel & Associates, Inc.***, 698 P.2d 880, 881 (N.M. 1985), the Supreme Court of New Mexico held, citing ***Garrity***, that an Arbitrator should not be given authority to award punitive damages; this power is reserved to the Courts. In ***United States Fidelity & Guaranty Co. v. DeFluiter***, 456 N.E.2d 429 (Ind. Ct. App. 1983), the Indiana Court of Appeals held that because arbitration arises out of a contractual relationship, punitive

damages are unavailable because parties may not contract to benefit from or be penalized by punitive damages. ***Id.*** at 432. ***See also, School City of East Chicago, Indiana v. East Chicago Federation of Teachers***, 422 N.E.2d 656, 663 (Ind. Ct. App. 1981).

The Trial Court's decision to modify the Award to eliminate the punitive damages purportedly imposed on Mr. O'Quinn was correct because the award of punitive damages violates important public policy concerns of the State of Texas. The policy concerns recognized by New York's highest court are just as true in Texas as they are in New York. Just as the New York Court of Appeals recognized, parties agree to arbitration for purposes of deciding their disputes without the expense, delay, and rigidities of traditional courts. If arbitrators are allowed to impose punitive damages, the usefulness of arbitration will be destroyed. It will mean, just as the New York Court of Appeals predicted, that the scope of the determination by arbitrators, by virtue of the license to award punitive damages, will become unpredictable and uncontrollable. Indeed, if arbitrators can award punitive damages without being subjected to even the controls required for a jury to award punitive damages, and without the trial court and appellate court review required with respect to jury awards, contracting parties will seek to avoid arbitration. On the other hand, if as a matter of public policy Arbitrators are not allowed to award punitive damages, arbitration will become an even more effective and favored means for resolving disputes between contracting parties.

II. This Court erred in holding that the parties submitted the issue of punitive damages to arbitration: (Germane to Point of Error on Rehearing Nos. 1, 5, 7 & 8)

A. Arbitrators must act within the limitations imposed by the parties' agreement and the law:

All arbitration proceedings in this State, whether conducted pursuant to the common law, the Texas General Arbitration Act, or the Federal Arbitration Act, arise out of consensual understandings. Article 224 of the Texas General Arbitration Act makes it clear that a written agreement is required to compel parties to arbitrate their disputes and the terms of the written agreement govern which disputes are submitted to arbitration. TEX. REV. CIV. STAT. ANN. art 224 (Vernon Supp. 1993). Because arbitration provisions are in derogation of a right of trial by jury, arbitration is not extended beyond the terms of the contract or to issues and matters not covered thereby. *See, e.g.,* ***Seale v. Roy M. Mitchell Contracting Co.***, 321 S.W.2d 149, 150 (Tex. Civ. App.--Austin 1959, writ ref'd). Texas courts consistently hold that the parties must have *specifically agreed* to arbitrate the particular matter in dispute. *See, e.g.,* ***Valero Energy Corp. v. Wagner & Brown***, 777 S.W.2d 564, 566 (Tex. App.--El Paso 1989, writ denied). Similarly, the United States Supreme Court has admonished that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." ***United Steelworkers v. Warrior & Gulf Navigation Co.***, 363 U.S. 574, 582 (1960).

Although it is often assumed that an arbitration award is entitled to great deference by the courts, this assumption is untrue with respect to the authority and jurisdiction of the arbitrators. An arbitrator's decision as to the scope of his

authority is subject to the scrutiny of the courts to ensure that the arbitrator acted properly. ***E.g., E. I. Du Pont de Nemours & Co. v. Local 900***, 968 F.2d 456, 458 (5th Cir. 1992); ***Babcock & Wilcox Co. v. PMAC, Ltd.***, 863 S.W.2d 225, 230 (Tex. App.--Houston [14th Dist.] 1993, writ requested).

The Texas General Arbitration Act provides for the determination of whether the arbitrators exceeded their authority or awarded on a matter not submitted, at least to the extent of determining whether the arbitrators acted within the bounds of their authority. Article 237 requires that an award be vacated when the arbitrators exceed their authority and Article 238 requires the modification or correction of an award when the arbitrators make an award on a matter not submitted to them. TEX. REV. CIV. STAT. ANN. arts. 237 & 238 (Vernon 1973). Review of the award is so important that, even where the parties expressly waive the right to judicial review of an arbitration award, the courts still have the authority to review the award under Articles 237 and 238. ***Grissom v. Greener & Sumner Constr., Inc.***, 676 S.W.2d 709, 711 (Tex. App.-- El Paso 1984, writ ref'd n.r.e.).

B. This Court's Opinion incorrectly addresses the arbitrators' authority on *procedural* questions instead of reviewing the award pursuant to Articles 237 and 238:

As noted, Articles 237 and 238 require the Texas courts to review arbitration awards if the review is timely requested. TEX. REV. CIV. STAT. ANN. arts. 237 & 238. Various grounds for review are specified in Articles 237 and 238. Mr. O'Quinn timely requested review of the award.

Despite the plain wording of Articles 237 and 238, this Court's Opinion essentially ignores the relevance of Ms. Kline's submissions to the arbitrators. *See* Op. at 8-10. In fact, Ms. Kline's demand for arbitration and other papers submitted to the arbitrators are the most important record of which issues were submitted to arbitration. ***See USX Corp v. West***, 781 S.W.2d 453 (Tex. App. -- Houston [1st Dist.] 1989, no writ) (considering pleadings and submissions to arbitrators). As detailed below, Ms. Kline never submitted the question of punitive damages to arbitration. Under Article 238(A)(2), the Trial Court was therefore required to modify the award to delete the award of punitive damages.

In its opinion, this Court cites ***USX***, ***John Wiley & Sons, Inc. v. Livingston***, 376 U.S. 543 (1964), and ***Del E. Webb Constr. v. Richardson Hosp. Auth.***, 823 F.2d 145 (5th Cir. 1987), for the proposition that procedural questions involving a dispute in arbitration should be left to the arbitrators. The "procedural questions" at issue in ***John Wiley*** and ***Del Webb***, however, dealt only with the procedures the parties were required to follow prior to invoking arbitration. In ***John Wiley***, the Court considered an agreement that required (1) a conference among an employee, a union representative, and an officer of the employer and (2) a conference among an officer of the employer, the union shop committee and/or a union representative *before* the parties initiated arbitration. 376 U.S. at 555-56. Similarly, ***Del Webb*** involved "contractual prerequisites for demanding arbitration," although the Fifth Circuit did not state just what these were. *See* 823 F.2d at 146 & 149-150.

In the arbitration clause at issue here, the parties were to "endeavor in good faith to resolve the dispute amicably" before resorting to arbitration. *See* Op. at 7. Whether or not they met this requirement would be a "procedural

question" for the arbitrators under ***John Wiley*** and ***Del Webb***. However, that question is not at issue in this case. Instead of such a "procedural question," this case involves the scope of the arbitrators' authority and whether punitive damages were submitted to the arbitrators.

A close reading of ***USX*** shows that it is consistent with Mr. O'Quinn's position. As detailed below, ***USX*** dealt primarily with the question of whether a trial court was required to *compel* arbitration after it had already stayed the case pending arbitration. *See* 781 S.W.2d at 454-56. In ***USX***, Energy Buyers filed suit, claiming both actual damages and punitive damages. ***Id.*** at 454 & 456. Unlike Ms. Kline, Energy Buyers clearly requested punitive damages. Moreover, Energy Buyers requested "damages" in its answer filed with the arbitrators. ***Id.*** at 455. With respect to the question of whether Energy Buyer's papers were sufficient or a clearer statement was required, the court observed that such matters were for the arbitrators. ***Id.*** at 456.

Unlike ***USX***, Ms. Kline's court pleadings failed to request punitive damages. Hence, there was no potential conflict between what Ms. Kline sought from the court versus the arbitration, as was the case in ***USX***. Moreover, Ms. Kline submitted her court pleadings to the Arbitrators to make it clear that she was seeking exactly the same relief in arbitration that she had requested from the court. Accordingly, the discussion in ***USX*** about procedural questions does not apply to Ms. Kline's submissions to the arbitrators. Ms. Kline's submissions to the arbitrators made it quite clear that she was seeking actual damages, <u>not</u> punitive damages.

C. Ms. Kline's own pleadings and demand for arbitration show that she did not

submit the issue of punitive damages to the arbitrators:

Due process of law applies in arbitration proceedings just as in other legal proceedings. This means that parties are entitled to fair notice of the claims made against them. This Court erred by failing to hold that the claims that Ms. Kline presented to the arbitrators were defined by her Plaintiff's Original Petition. By letter of May 28, 1991 from Ms. Kline's counsel to Ms. Tamme S. Wilkes of the American Arbitration Association, Ms. Kline's counsel transmitted the Original Petition to the American Arbitration Association as the definition of Ms. Kline's claim. In her Original Petition, Ms. Kline alleged breach of contract, breach of an alleged tort duty of good faith, and breach of an alleged fiduciary duty. Ms. Kline pled and prayed only for actual damages, *i.e.*, economic losses. Ms. Kline did not plead or pray for exemplary damages. Indeed, there is no mention -- not one single word -- in the Original Petition about exemplary damages.

In this case there was no pleading or prayer -- no notice whatsoever -- that Ms. Kline was asking for punitive damages. Moreover, Ms. Kline did not plead the existence of a separate and distinct tort that caused separate actual damages in tort. Each of these elements is required by Texas law before a claimant can recover punitive damages. Lawyers who are trained to recognize the necessary elements of a claim for punitive damages simply could not have known from Ms. Kline's pleadings that she was thinking about attempting to recover punitive damages. The law does not require them to guess as what Ms. Kline might be secretly planning.

This Court incorrectly ignored Ms. Kline's own submissions to the arbitrators. On page 10 of its Opinion, the Court suggests that Ms. Kline's submission to the arbitrators constitutes "extrinsic evidence" which need not be considered. The Texas General Arbitration Act, however, requires the courts to modify or correct an award if the arbitrators issue an award on "a matter not submitted to them..." TEX. REV. CIV. STAT. ANN. art. 238(A)(2). Moreover, both this Court and the Texas Supreme Court have considered such "extrinsic" matters in determining the scope of the matters submitted to arbitration. ***See USX Corp. v. West***, 781 S.W.2d 453, 455 (Tex. App.--Houston [1st Dist.] 1989, no writ) (considering papers submitted to the American Arbitration Association); ***Gulf Oil Corp. v. Guidry***, 327 S.W.2d 406, 407-11 (Tex. 1959) (considering various papers and correspondence among the arbitrators). Hence, Ms. Kline's statement of her claims via her submissions to the arbitrators is extremely important.

The Trial Court found that the issue of punitive damages was not submitted to the arbitrators. Both ***USX*** and ***Gulf Oil*** make it clear that the Trial Court properly considered Ms. Kline's submissions to the AAA. In the absence of a transcript of the arbitration proceedings, this Court should defer to the Trial Court on the question of whether, despite Ms. Kline's submissions, the parties nonetheless submitted the issue of punitive damages to arbitration. Despite the Court's statement to the contrary, it need not follow ***House Grain Co. v. Obst***, 659 S.W.2d 903, 906 (Tex App.--Corpus Christi 1983, writ ref'd n.r.e.), and "presume adequate evidence to support the award." As pointed out in Justice Ellis' dissent, ***Obst*** created this supposed presumption without any supporting authority from the Texas Supreme Court. Moreover, ***Gulf Oil*** suggests that the Texas courts should consider various papers, including correspondence, to determine whether a particular

issue was submitted to arbitration and whether the arbitrators exceeded their authority. ***Gulf Oil***, 327 S.W.2d at 407-11.

Finally, it is important to note that the appellant generally bears the risk of having an inadequate record. *See* ***Christiansen v. Prezelski***, 782 S.W.2d 842, 843 (Tex. 1990); TEX. R. APP. P. 50(d). Hence, if an appellant (such as Ms. Kline) fails to present a complete statement of the facts, the appellate court cannot properly determine that the Trial Court's ruling was incorrect. *See Christiansen*, 782 S.W.2d at 843-44. In the past, this Court has emphasized that the appellant, not the appellee, bears the burden of submitting an adequate record to reverse the trial court's handling of an arbitration award. ***Atrium Westwood VIII Venture v. Barrick Westwood L.P.***, 693 S.W.2d 699, 700-01 (Tex. App.--Houston [14th Dist.] 1985, no writ). Accordingly, this Court's presumption of evidence to support the award, a presumption which runs contrary to Ms. Kline's own submission to the AAA and this Court's decision in ***Westwood***, is in error. Instead, the Court should rely on Ms. Kline's submissions to the arbitrators and defer to the Trial Court's findings.

D. The parties' agreement precluded the submission of the question of punitive damages:

The dispute submitted to the arbitrators arose out on a written agreement among Ms. Kline, Mr. O'Quinn and Mr. Pearson relating to the apportionment of legal fees received from several cases. In this agreement, there was an arbitration provision which provides as follows:

> In the event that a dispute arises among Parties that cannot be amicably resolved or, Parties have elected to terminate this Agreement and are unable to reach an agreement to that end, said dispute shall be determined by arbitration conducted in the City of Houston, State of Texas, in accordance with the rules then in force of the American Arbitration Association. [Tr. 34]

By this agreement, Mr. O'Quinn, Ms. Kline and Mr. Pearson did not expressly, or even by implication, grant authority to the Arbitrators to award exemplary damages in connection with disputes arising out of an alleged breach of the contract in dispute.

This arbitration provision is fairly narrow -- it avoids the broad terminology frequently found in arbitration provisions that the parties submit "any and all claims, demands, disputes, controversies, or other matters pertaining to the written agreement in issue, whether or not arising independently out of the written agreement, and whether in contract, tort or otherwise." *See* ***Babcock & Wilcox***, 863 S.W.2d at 230 (listing several examples of broad arbitration clauses, each of which starts with "any dispute" or the like). The use of the narrow arbitration provision in the agreement among Ms. Kline, Mr. O'Quinn, and Mr. Pearson

thus demonstrates that the parties intended for the arbitrators to resolve contractual disputes, not to award exemplary damages for alleged activities outside the scope of the contract.

Despite the Court's view that the arbitration clause is broad, it is quite similar to the one at issue in ***Central Texas Clarklift, Inc. v. Simmons***, 540 S.W.2d 745, 746-47 (Tex. Civ. App.--Waco 1976, no writ). That case involved the following arbitration clause:

> Upon the occurrence of a dispute relative to any provision of this Agreement or the application of any provision of this Agreement or if a price determination is required by any Paragraph herein, the same shall be submitted to arbitration under the terms and conditions of the "Texas General Arbitration Act."

540 S.W.2d at 746. In ***Simmons***, the plaintiff had sold a business. As part of the sale contract, Mr. Simmons also agreed to a covenant not to compete. When the buyer learned of Mr. Simmons' new employment with Trans Lift, the buyer sent letters and made telephone calls to Trans Lift asserting that Mr. Simmons was violating the covenant not to compete. 540 S.W.2d at 746. Mr. Simmons sued the buyer for tortious interference. The court of appeals held that the claim for tortious interference was not within the scope of the above arbitration clause, as the alleged intentional tort was not a dispute relating to the contract. ***Id.*** at 747.

The arbitration provision in the contract among Ms. Kline, Mr. O'Quinn and Mr. Pearson was clearly no broader than that at issue in ***Simmons***. Moreover, the arbitration clause in this case clearly did not authorize the

arbitrators to award punitive damages for activities for which punitive damages may not be awarded under Texas law, *i.e.*, for breach of contract. In this case, as discussed below, the only alleged activities that could have possibly given rise to punitive damages would have been activities outside the agreement. As in ***Simmons***, the arbitration provision between Mr. O'Quinn and Ms. Kline did not specifically authorize the arbitrators to award punitive damages for outside-the-contract activities. Because of the unique and harsh nature of punitive damages, it is inappropriate to assume that the parties intended the arbitration provision to authorize the arbitrators to award punitive damages for outside-the-contract activities.

While the issue is not settled in Texas, the El Paso Court of Appeals has held that the arbitrators have the power to award punitive damages -- where the parties have ***expressly*** submitted the issue to the arbitrators. ***Grissom v. Greener & Sumner Constr., Inc.***, 676 S.W.2d 709, 711 (Tex. App. -- El Paso 1984, writ ref'd n.r.e.). But the ***Grissom*** decision is not applicable here because the parties here did not expressly submit the issue to the arbitrators. It is respectfully that, as a matter of law, arbitrators should not be allowed to award punitive damages unless the parties have specifically and expressly granted that authority to the arbitrators.

In its Opinion, this Court relied heavily on ***USX Corp. v. West***, 781 S.W.2d 453 (Tex. App. -- Houston [1st Dist.] 1989, no writ). In ***USX***, this Court refused to mandamus Judge David West to require him to grant a motion to compel arbitration because he had already granted a motion to stay pending arbitration. ***USX***, 781 S.W.2d at 454-56. In effect, the court reviewed the pleadings and submissions to the arbitrators, concluding that they were sufficient to submit various contract and tort claims, and various types of

damages, to the arbitrator. The court then left it to the parties and the arbitrator to address pleading issues. ***Id.*** at 456-57.

Significantly, however, the ***USX*** case did not address the basic question of whether an award of punitive damages is constitutional or otherwise prohibited by public policy. Moreover, the ***USX*** case did not address questions involving the determination of what was submitted to arbitration; instead ***USX*** involved what should be submitted. Deference in favor of arbitration at the early stages of a dispute makes sense, as it seems likely to further the use of arbitration. After an arbitration proceeding is concluded, however, the Texas General Arbitration Act requires the consideration of what was submitted and whether the arbitrators exceeded their authority.

E. The Trial Court's Judgment Should be Affirmed because the arbitrators exceeded their authority:

The Court incorrectly avoided the issue of whether the arbitrators exceeded the scope of their authority. *See* Op. at 6. Instead of addressing this alternative basis for affirming the Trial Court, the Court observed that the Trial Court only modified the award, implying that the Trial Court's finding that the arbitrators exceeded their authority is irrelevant. In fact, this finding (which is not rejected by the Court) means that the Judgment should be affirmed.

As this Court correctly notes, Article 237 provides for vacating an award when the arbitrators exceed their authority. Article 238 provides for modification and correction when the arbitrators have awarded on a matter not submitted to them. *See* TEX. REV. CIV. STAT. ANN. art. 237 & 238. Nonetheless, there will be few, if any, cases

where the arbitrators may award on a matter not submitted, yet still act within their authority. This is because all arbitration derives its authority from the parties' agreement. Consequently, there is a great deal of overlap between Articles 237 and 238 -- they are not mutually exclusive, as the Court suggests.

The Texas courts may modify a part of an award if that portion is outside the arbitrators' authority. In ***Smith v. Barnett***, 373 S.W.2d 762, 765-66 (Tex. Civ. App. -- Dallas 1963, no writ), the court modified an award to delete an incorrect amount of interest. The court viewed the mistake as not due to the arbitrators, yet held that even if the arbitrators exceeded their authority, the incorrect amount "could be disregarded as mere surplusage, and the remainder of the award left standing." ***Id.*** at 766. As in ***Smith***, this Court should have affirmed the Trial Court's Judgment to delete the portion of the award which exceeded the arbitrators' authority. Hence, this Court erred when it reversed the Trial Court's Judgment setting aside the punitive damages portion of the award.

III. Ms. Kline was not entitled to punitive damages:

This case illustrates a key problem with arbitration -- The arbitrators may, either inadvertently or intentionally, enter an award clearly contrary to the law, yet that award might be upheld. Even this Court hold that Mr. O'Quinn owed no fiduciary duty to Ms. Kline. Moreover, Justice Ellis clearly points out that Mr. O'Quinn owed no tort duty of good faith and fair dealing. The only other claim submitted to arbitration was Ms. Kline's contract claim. As detailed below, Texas law clearly prohibits an award of punitive damages for mere breach of contract. But that is exactly the result of the Opinion.

A. Under Texas law, there are special rules applicable to punitive damages:

In addition to failing to plead and pray for exemplary damages and thus failing to submit the issue of punitive damages to the arbitrators, there is another, perhaps even more important, reason why Ms. Kline as a matter of law may not be awarded exemplary damages. Texas law simply does not allow the recovery of punitive damages for breach of contract, even if the breach is intentional, willful, and malicious. *See, e.g., **Manges v. Guerra***, 673 S.W.2d 180, 184 (Tex. 1984); ***Amoco Prod. Co. v. Alexander***, 622 S.W.2d 563, 571 (Tex. 1981). Because plaintiffs continually attempt to side-step this rule by clever pleading, the Texas Supreme Court has established the rule that a complainant's ability in Texas to recover exemplary damages in connection with a breach of contract claim is subject to special rules and requirements. The Texas Supreme Court has held that in order to recover punitive damages attendant to a contract dispute a claimant must both (1) plead and (2) prove: (a) the commission of a separate tort, and (b) **that the claimant**

sustained separate actual damages as a result of that separate tort. See, e.g., ***International Bank, N.A. v. Morales***, 736 S.W.2d 622, 624 (Tex. 1987); ***Texas Nat'l Bank v. Karnes***, 717 S.W.2d 901, 903 (Tex. 1986); ***Jim Walter Homes, Inc. v. Reed***, 711 S.W.2d 617, 618 (Tex. 1986); ***Bellefonte Underwriter's Ins. Co. v. Brown***, 704 S.W.2d 742, 745 (Tex. 1986).

Simply alleging, as Ms. Kline did, that the defaulting party to a contract allegedly also breached some tort duty, *e.g.*, fiduciary duties or an implied duty of good faith and fair dealing, will not suffice. There must also be pleading and proof that the separate and distinct tortious conduct caused the claimant to sustain separate and distinct actual damages in tort. It is only the separate actual damages in tort that will support a claim for exemplary damages! *See, e.g.*, ***International Bank***, 736 S.W.2d at 624; ***Texas Nat'l Bank***, 717 S.W.2d at 903; ***Jim Walter Homes***, 711 S.W.2d at 618; ***Bellefonte Underwriter's Ins. Co.***, 704 S.W.2d at 745.

In a further attempt to side-step these requirements, plaintiffs frequently argue that their economic losses in fact are their required "tort" damages. The Texas Supreme Court has rejected this argument. The Court has established the doctrine that if the actual damages sustained by the claimant are economic losses arising out of breach of the contract involved in the litigation, then no matter how the complainant disguises or characterizes her so-called tort claims, the dispute is simply one of breach of contract. *See, e.g.*, ***Crim Truck & Tractor Co. v. Navistar***, 823 S.W.2d 591, 594-95 (Tex. 1992); ***Southwestern Bell Telephone Co. v. FDP Corp.***, 811 S.W. 2d 572, 577 (Tex. 1991); ***Southwestern Bell Telephone Co. v. Delaney***, 809 S.W.2d 493, 495 (Tex. 1991); ***International Bank***, 736 S.W.2d at 624; ***Texas Nat'l Bank***, 717 S.W.2d at 903; ***Jim Walter Homes***, 711 S.W.2d at 618; ***Bellefonte Underwriter's Ins. Co.***, 704 S.W.2d at 745; and ***Amoco Prod. Co.***, 622 S.W.2d at 571.

In this case, there was no pleading of separate tortious conduct by Mr. O'Quinn that caused separate actual damages in tort to Ms. Kline. Ms. Kline alleged that she sustained economic losses resulting from alleged breach of contract. Ms. Kline claimed she was entitled to monies owed to her under the contract, plus interest. The Award of actual damages made her whole. But then Ms. Kline presented the conclusory rhetoric commonly found in pleadings of this nature, the rhetoric which the Texas Supreme Court has consistently held gives rise only to a claim for breach of contract. Ms. Kline made the conclusory allegations that Mr. O'Quinn breached an alleged duty of good faith and breached an alleged fiduciary duty. But, even if such allegations were true, which is denied, Ms. Kline did not plead and prove any separate actual damages in tort (*e.g.*, mental anguish, etc.) caused by the alleged tortious conduct. Thus, while these other extraneous allegations may sound bad (in fact, that is why plaintiffs usually add them into their petition when suing on a contract), they do not convert the case into a tort dispute and they will not support an award of punitive damages.[3/]

3/ In most situations where a plaintiff is suing on a contract and is also attempting to recover exemplary damages, the plaintiff at least pleads that he or she is seeking exemplary damages. This at least gives the defendant fair notice of the plaintiff's intentions. But here Ms. Kline not only failed to plead and prove separate actual damages in tort to support an award of exemplary damages -- but did not even plead or pray for exemplary damages at all!

Unfortunately, there is no transcript of the arbitration proceeding. Hence, this Court must rely on the pleadings and other submissions in order to determine what was submitted to the arbitrators. Although Ms. Kline suggests that it is somehow Mr. O'Quinn's fault that there is no transcript, Ms. Kline also failed to seek a transcript. As detailed above, the Trial Court properly relied on Ms. Kline's submissions to the AAA to define her claims.

B. Ms. Kline also failed to plead and prove the type of intentional conduct necessary to support an award of punitive damages:

Assuming that Ms. Kline had actually pled and proved separate actual damages in tort sustained as a result of breach of an alleged duty of good faith and fair dealing and/or an alleged fiduciary duty, she still would not be entitled to punitive damages. A breach of the duty of good faith and fair dealing by itself does not entitle the injured party to punitive damages. A breach of a fiduciary duty by itself does not entitle the injured party to punitive damages. In order to recover exemplary damages for breach of the duty of good faith and fair dealing or breach of fiduciary duty, a complainant must also plead and prove and obtain the additional finding of fraud, malice, or gross negligence. *See* TEX. CIV. PRAC. & REM. CODE § 41.003 (Vernon Supp. 1993); ***Burk Royalty Co. v. Walls***, 616 S.W.2d 911, 922 (Tex. 1981) (addressing the issue of exemplary damages in general); ***Arnold v. Nat. County Mutual Fire Ins. Co.***, 725 S.W.2d 165, 168 (Tex. 1987) (addressing the issue of exemplary damages in connection with claim of a breach of a duty of good faith and fair dealing); ***Manges v. Guerra***, 673 S.W.2d 180, 184 (Tex. 1984) (addressing the issue of exemplary damages in connection with a claim of breach of fiduciary duty). Because Ms. Kline did not plead or prove

this additional element, she was never entitled to an award of exemplary damages for breach of the alleged torts of good faith and fair dealing and/or fiduciary duty. Hence, the Final Judgment should be affirmed.

IV. Conclusions:

Because one of the underlying theories of arbitration is that there should be minimal court review and supervision, allowing arbitrators to award punitive damages will lead to unpredictable, uncontrolled, and nonreviewable awards of punitive damages. This violates public policy concerns of the State and fails to comply with the requirements of the United States and Texas Constitutions. Should this Court conclude that policy and constitutional concerns do not require barring arbitrators completely from awarding punitive damages, those same concerns require that at the very least arbitrators may not award punitive damages except where the contracting parties have expressly granted them the authority to do so. Here the narrowly drawn contractual arbitration provision did not authorize the arbitrators to award punitive damages. This Court did not address the Constitutional issues at all on the basis that Mr. O'Quinn waived these issues. However, the rule cited by this Court for the waiver principle is applicable only to appellants, not appellees. The Texas Supreme Court has repeatedly held that an appellee satisfied with the judgment below does not have to urge below additional grounds in support of the judgment. The appellee is free to raise these additional issues on appeal, which Mr. O'Quinn has done. Mr. O'Quinn is entitled to his day in court before this Honorable Court with respect to the Constitutional issues.

Moreover, this is a case in which the claimant did not properly lodge a claim for punitive damages. Ms. Kline's failure to request punitive damages in her pleadings

demonstrates that the parties never intended to allow the arbitrators to award punitive damages. She sought only economic losses for breach of contract. It was only after the close of evidence that Ms. Kline's counsel (obviously believing he had successfully attacked Mr. O'Quinn) asked for such damages. Ms. Kline made this belated request even though Texas law does not allow the recovery of punitive damages under these circumstances. The Arbitrators, completely contrary to well-settled Texas law, nevertheless awarded such damages. This action by the Arbitrators exceeded their authority. It is respectfully submitted that the Trial Court was correct in modifying the Award to vacate the portion thereof where the Arbitrators exceeded their authority.

Mr. O'Quinn respectfully urges that the Court reconsider its Opinion of March 24, 1994, and upon rehearing modify that decision and instead affirm the Trial Court's *Final Judgment*.

Respectfully submitted,

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JOHN M. O'QUINN

CERTIFICATE OF SERVICE

I hereby certify that a copy of this MOTION FOR REHEARING OF APPELLEE JOHN M. O'QUINN was served upon each of Donna C. Kline, Thomas J. Pearson, and Bank One, Texas, N.A., by mailing a copy of same via certified mail, return receipt requested, to their respective counsel of record as follows:

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This 8th day of April, 1994.

/s/ J. Clark Martin

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APPENDIX M

NO. _____

JOHN M. O'QUINN,
Petitioner,

vs.

DONNA C. KLINE,
Respondent

IN THE TEXAS SUPREME COURT

APPLICATION FOR WRIT OF ERROR OF PETITIONER JOHN M. O'QUINN

J. Clark Martin
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TO THE SUPREME COURT OF TEXAS:

COMES NOW Petitioner John M. O'Quinn ("O'Quinn") and respectfully files this Application for Writ of Error. For the reasons set forth below, O'Quinn prays that this Court grant the Application for Writ and ***reverse*** the decision of the Court of Appeals and ***affirm*** the Final Judgment of the Trial Court.

NAMES OF ALL PARTIES

Petitioner:	John M. O'Quinn
Petitioner's Counsel:	J. Clark Martin Steven R. Borgman Vinson & Elkins L.L.P.
Respondent:	Donna C. Kline
Respondent's Counsel:	Norman Riedmueller Michael Pullara
Appellee:	Thomas J. Pearson
Appellee's Counsel:	Thomas J. Pearson & Associates Pro se
Appellee:	Bank One, Texas, N.A.
Appellee's Counsel:	Cheryl E. Irvin Irvin, Clark & Burnett

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STATEMENT OF THE CASE:

This appeal arises out the arbitration of a contract dispute among lawyers over the allocation of contingent fees from various cases. Although Donna C. Kline ("Kline") did not seek punitive damages, and there was no notice that punitive damages might be in issue in the Arbitration Proceeding, and Texas law does not allow the award of punitive damages under the facts of this dispute, the Arbitrators awarded punitive damages. The Trial Court then correctly entered Final Judgment in the amount of the actual damages awarded by the Arbitrators but modified and partially vacated the Award to set aside the punitive damages the Arbitrators had improperly attempted to award. Kline appealed. The Fourteenth Court of Appeals then modified the Trial Court's Final Judgment to award punitive damages against O'Quinn. As detailed in this Application for Writ of Error, there are numerous reasons why the Court of Appeals' decision is erroneous.

In the mid-80's, O'Quinn entered into an agreement with Don Maierson ("Maierson"), an attorney, with respect to certain "toxic tort" cases, often referred to as the ***Liberty Waste*** cases. Under this agreement, O'Quinn was to receive 45% of any fees recovered in the ***Liberty Waste*** cases, with Maierson to use the other 55% to pay himself and the other attorneys working on the case. [SOF 582-584; P. Exhs. 3 & 4] On March 1, 1988, Kline and O'Quinn and Thomas J. Pearson ("Pearson") entered into an agreement by which O'Quinn would fund and assist in certain cases. [Tr. 11-20] Later, Kline, O'Quinn, and Pearson entered into a second agreement dated January 20, 1989 [P. Exh. 7] detailing their understanding of how the fees were to be allocated (the "Agreement"). [Tr. 21-38]

Maierson, O'Quinn, Kline, and Pearson were ultimately successful in their representation of their clients in these cases. As a result of various settlements in the cases covered by the above agreements, sums were received for the clients and attorney's fees were recovered.

In early 1991, Kline filed suit against O'Quinn, Pearson, and Mbank (now Bank One, Texas, N.A.), claiming that they owed her additional attorney's fees from the settlements of certain lawsuits. [Tr. 2] As detailed in Kline's *Original Petition*, she sued O'Quinn and Pearson. Bank One was named in Kline's lawsuit, but no claim was made against Bank One. [Tr. 8] Kline alleged that O'Quinn and Pearson were in breach of their contractual obligations regarding the allocation of attorney's fees. Kline sought to recover the economic losses she claimed she sustained as a result of the breach of the Agreement by O'Quinn and Pearson. Although her lawsuit was to recover monies that she claimed she was owed under the Agreement, Kline also alleged that O'Quinn and Pearson breached an alleged tort duty of good faith and fair dealing and had assumed the duties of fiduciaries and had breached a fiduciary duty. O'Quinn answered and denied all wrongdoing. [Tr. 48]

After filing suit, on March 8, 1991, Kline then filed a demand for arbitration with the American Arbitration Association. [P. Exh. 76] Kline's demand for arbitration described the dispute as a "disagreement among attorneys over contingent fee recoveries." [P. Exh. 76] Kline also submitted her Original Petition to the AAA, together with an explanatory letter, which noted that the Original Petition "states Kline's position on the matters and controversy more clearly than the papers previously submitted" to the AAA. [Supp. Tr. 30-31] Neither Kline's demand for arbitration nor her Original Petition made any request for an award of punitive damages. [Tr. 2-10, Supp. Tr. 27-31] In her prayer, Kline requested only actual damages, attorney's fees, pre-judgment and post-judgment interest, and a declaration of the rights and duties of the parties with respect to each other. [Tr. 8-10] O'Quinn presented his claims for monies owed to him by Pearson and Kline. [Tr. 300-304]

Because the agreements among Kline, O'Quinn, and Pearson provided for arbitration, these three parties proceeded to arbitration before the AAA in Arbitration No.

70 194 0030 91 W. The arbitration hearing was held in May 1992. There was no transcript or other record maintained on the Arbitration Proceeding. On June 23, 1992, the Arbitrators issued their "Award of Arbitrators." [Tr. 81] The Arbitrators awarded Kline compensatory damages against O'Quinn, plus pre-Award and post-Award interest. Even though not pled for by Kline, the Arbitrators stated that O'Quinn was to pay Kline $50,000 in exemplary damages. The Award stated that each party shall bear its own attorneys fees and share equally in the fees and expenses of arbitration. The Arbitrators held that "all relief not specifically granted in the Award is hereby denied" [Tr. 81] and that the "Award is in full settlement of all claims and counterclaims submitted to this Arbitration" [Tr. 82].

Because the Arbitrators' Award improperly purported to assess punitive damages against him, O'Quinn timely sought review of the Award by the Arbitrators pursuant to Articles 232, 237 and 238 of the Texas General Arbitration Act. [Tr. 83] The Arbitrators summarily denied O'Quinn's Motion. [Tr. 96] O'Quinn then filed with the Trial Court his Motion to Vacate, or, Alternatively, Modify and Correct the Award. [Tr. 58-72] About the same time, Kline filed a motion, styled an Application for Decree, seeking to confirm the Award. [Tr. 78-80]. O'Quinn then filed an Opposition to Kline's Application for Decree [Tr. 99-108].

On October 2, 1992, the Trial Court held a hearing regarding the issues raised by O'Quinn's Motion to Vacate, or, Alternatively, to Modify and Correct the Award, and by Kline's Application for Decree. [Tr. 274-275] At this initial hearing, the Trial Court ruled that the arbitrators exceeded their authority by ordering O'Quinn to pay punitive damages and by ordering payment of the Award within thirty (30) days after it was signed (the Arbitrators did not give the parties time to file Motions for modification or have the courts consider the propriety of the Arbitrators' Award). [Tr. 274-275] At this second hearing, the Trial Court again ruled that the Arbitrators exceeded the scope of their authority by awarding punitive damages and by requiring payment of the award within thirty

(30) days. The Trial Court instructed the parties to brief the issue of what, if any, issues remained for trial with respect to Kline's claims against O'Quinn. On October 22, 1992, a letter was filed on behalf of Kline. [Tr. 126-130] This letter asserted once again that the Award should be confirmed. Kline also took the position, however, that if the Trial Court refused to completely confirm the Award, then the Trial Court should allow Kline to proceed to trial against O'Quinn on the issue of punitive damages. [Tr. 126-130]

On October 29, 1992, O'Quinn's attorneys filed a letter stating O'Quinn's position on the issues raised by Kline. [Supp. Tr. 13-24] O'Quinn pointed out that the doctrine of *res judicata* barred the re-litigation of the same factual transaction which was the subject of the arbitration proceeding and the resulting Award. Accordingly, O'Quinn's letter pointed out that there were no remaining issues for trial.

On October 30, 1992, O'Quinn filed his Motion for Judgment. [Tr. 274-276] On November 6, 1992, the Trial Court held a hearing on O'Quinn's Motion. At this third hearing, the Trial Court reconfirmed her prior rulings but declined to enter a Judgment incorporating her prior rulings. The Trial Court stated that there should be only one Judgment signed in this case and that such Judgment would be signed after all of the issues were resolved.

On December 18, 1992, the Trial Court held a pretrial hearing. At this pretrial hearing, the parties again addressed the issue of what, if any, issues remained for trial as between Kline and O'Quinn. [SOF PT 4-21][1] The Trial Court again ruled, as in its earlier hearings, that the portion of the Award purporting to grant punitive damages was incorrect and the Award would be modified. [SOF PT 21] The Trial Court also

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[1] The abbreviation PT stands for the PreTrial portion of the Statement of Facts. The record contains two volumes beginning with page 1, *i.e.*, the PreTrial volume and the first volume of the trial.

refused to allow Kline to recover her attorney's fees incurred in connection with confirming and enforcing the Award. [SOF PT 34] Kline then argued in the alternative that she should be entitled to a trial on the issue of punitive damages alone. [SOF PT 19-20] The Trial Court rejected this idea. [SOF PT 21]

Although the Trial Court's rulings made it clear that there were no issues remaining for trial as against O'Quinn, the Trial Court did not enter any written order. Instead, the Trial Court carried O'Quinn with the case, which proceeded to trial against Defendant Bank One on December 21, 1992. At the close of Kline's case in chief on September 28, 1992, Bank One moved for a directed verdict. [SOF 654] After listening to the parties' arguments, the Trial Court granted Bank One's motion. [SOF 670-71] The Trial Court then entered its *Final Judgment* on January 4, 1993. [Tr. 379-82] O'Quinn paid the Final Judgment as it applies to him. Kline appealed from the *Final Judgment*.

In his briefs before the Court of Appeals, O'Quinn urged the Fourteenth Court to affirm the Trial Court's Judgment on a number of grounds. Among other things, O'Quinn argued that punitive damages simply may not be awarded by arbitrators operating under Texas law because such awards (1) violate the public policy of the State of Texas and (2) violate the constitutional safeguards provided by the U.S. and Texas constitutions. Nonetheless, the Court of Appeals incorrectly sustained Kline's point of error No. 1, and held that the Trial Court incorrectly modified the arbitrator's award. O'Quinn urges this Court to reverse the decision of the Court of Appeals and affirm the Trial Court's Judgment.

STATEMENT OF JURISDICTION:

The Texas Supreme Court has jurisdiction pursuant to Section 22.001(a)(1), (a)(3) & (a)(6) of the Texas Government Code.

POINTS OF ERROR:

1. The Court of Appeals erred in reversing the portion of Trial Court's Judgment that modified the arbitration award to exclude punitive damages from the award. (Op. at 6-12.)

2. The Court of Appeals erred in holding that certain aspects of O'Quinn's Constitutional arguments were waived. (Op. at 11.)

3. The Court of Appeals erred in holding that the arbitration award of punitive damages may be affirmed without violating the United States or Texas Constitutions. (Op. at 11.)

4. The Court of Appeals erred in holding that the arbitration award of punitive damages may be affirmed without violating the United States or Texas Constitutions because arbitration proceedings in general lack the necessary safeguards required by the United States and Texas Constitutions for arbitrators to award punitive damages, even if the parties attempt to specifically bestow that right upon the arbitrators. (Op. at 11.)

5. The Court of Appeals erred in holding that the arbitration award of punitive damages may be affirmed without violating the United States or Texas Constitutions because arbitration proceedings in general lack the necessary safeguards required by the United States and Texas Constitutions for arbitrators to award punitive damages and thus arbitrators may not award punitive damages unless the parties have clearly and expressly waived their Constitutional rights by authorizing the arbitrators to award punitive damages. (Op. at 11.)

6. The Court of Appeals erred in holding that the arbitration award of punitive damages may be affirmed without violating the United States or Texas Constitutions because these arbitration proceedings as conducted denied O'Quinn's Due Process of law. (Op. at 11.)

7. The Court of Appeals erred in failing to adopt and apply as the public policy of Texas a rule that prohibits arbitrators from awarding punitive damages even when the parties attempt to grant the arbitrators the authority to award such relief. (Op. at 11-12.)

8. The Court of Appeals erred in failing to adopt and apply as the public policy of Texas a rule that prohibits arbitrators from awarding punitive damages unless the parties have specifically and expressly agreed to give the arbitrators the authority to award such relief. (Op. at 11-12.)

9. The Court of Appeals erred in reversing the portion of the Trial Court's Judgment that denied the award punitive damages because there is no legal basis for an award of punitive damages in this case. (Op. at 6-12 & 14-18.)

10. The Court of Appeals erred in concluding that the parties contemplated the arbitration of tort claims and especially claims for punitive damages. (Op. at 7-10.)

11. The Court of Appeals erred in concluding that the award of punitive damages was within the scope of the arbitrators' authority. (Op. at 6-10.)

12. The Court of Appeals erred in concluding that the arbitrators could have found that Kline's pleadings were sufficient to state a claim for punitive damages. (Op. at 8-10.)

13. The Court of Appeals erred in presuming that the evidence before the arbitrators supported an award of punitive damages. (Op. at 10.)

14. The Court of Appeals erred in holding that, as the losing party in arbitration, Mr. O'Quinn was required to bring forward to the Trial Court a complete record and all bases for vacating or modifying the Arbitration Award. (Supp. Op. at 2.)

BRIEF OF THE ARGUMENT:

I. This case involves important issues regarding punitive damages:

As this Court recently observed, punitive damages are "exceptional" in nature. ***Transportation Ins. Co. v. Moriel***, 37 Tex. Sup. Ct. J. 888, 886-87 (June 8, 1994). Indeed, Texas courts have long recognized the "close connection" between punitive damages and the criminal law:

> Such indifference is morally criminal, and if it leads to actual injury may well be regarded as criminal in law. A mere act of omission or non-feasance, to be punishable by exemplary damages, should reach the borderline of a quasi-criminal act of commission or malfeasance.

Id. at 886 (quoting ***Southern Cotton Press & Mfg. Co. v. Bradley***, 52 Tex. 587, 600-01 (1880)).

The United States Supreme Court also recently emphasized the special nature of punitive damages:

> Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of the evidence of defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences. Judicial review of the amount awarded was one of the few procedural safeguards which the common law provided against that danger.

Honda Motor Co. v. Oberg, 62 U.S.L.W. 4627, 4631 (June 24, 1994); *see also* ***Pacific Mut. Life Ins. Co. v. Haslip***, 499 U.S. 1,

18 (1991) (expressing concern that unlimited jury discretion could allow punitive damages to "run wild").

This case presents important issues involving the special nature of punitive damages in the context of arbitration. The arbitrators' award of punitive damages in this case violated O'Quinn's Due Process rights. The award of punitive damages against O'Quinn violated the U.S. and Texas constitutions, as well as the public policy of Texas, because the arbitration process failed to provide the safeguards needed to protect against excessive and inappropriate awards of punitive damages.

II. Arbitrators generally should not be allowed to award punitive damages: (Germane to Point of Error Nos. 1, 2, 3, 4, 5 & 6)

There are two fundamental reasons why arbitrators should not be allowed to award punitive damages in arbitration proceedings under Texas law. First, arbitration proceedings lack the substantive and procedural safeguards required by the Due Process Clause of the United States Constitution and the Due Course of Law Clause of the Texas Constitution. Second, allowing Arbitrators to award punitive damages is contrary to the public policies of this State. For the reasons discussed below, this Court should therefore reverse the Fourteenth Court's decision and affirm the Trial Court's Judgment.

A. O'Quinn did not waive his Constitutional rights or the Constitutional arguments against allowing arbitrators to award punitive damages: (Germane to Point of Error No. 2)

The Fourteenth Court of Appeals divided O'Quinn's Constitutional arguments into two different groupings. The Court of Appeals acknowledged that O'Quinn raised below the issue of whether lack of notice as to punitive damages violated his Constitutional right to Due Process. The Court of Appeals in effect held that O'Quinn "waived" his Constitutional rights

of Due Process by signing a contract containing an arbitration provision -- although the arbitration provision said nothing of any such waiver and did not bestow on the Arbitrators the right to award punitive damages. Op. at 11. The Fourteenth Court of Appeals then declined to address O'Quinn's remaining Constitutional arguments on the basis that these arguments were not raised before the Trial Court. The Court of Appeals was incorrect on both counts.

We turn first[2] to the Court of Appeals' position that some aspects of O'Quinn's Constitutional arguments were waived because they were not specifically raised before the Trial Court. This is incorrect. O'Quinn was the prevailing party in the Trial Court. Kline, not O'Quinn, was the party who appealed from the Trial Court's *Final Judgment*. In the Court of Appeals, O'Quinn was the appellee. As the prevailing party in the Trial Court and the appellee in the Court of Appeals, O'Quinn was not required to argue every alternative theory on which the Trial Court could have based its decision. ***Williams v. Khalaf***, 802 S.W.2d 651, 658 (Tex. 1990); ***Boyce Iron Works, Inc. v. Southwestern Bell Tel. Co.***, 747 S.W.2d 785, 787 (1988). This Court's decisions make it clear that an appellee has not waived an alternative basis for supporting the trial court's decision simply because appellee did not make the alternative argument in the trial court.

Specifically, at the first hearing involving the arbitration award, the Trial Court ruled from the bench in favor of O'Quinn. As detailed in O'Quinn's Briefs filed with the Court of Appeals, the Trial Court reaffirmed this ruling on several occasions, including at the pretrial conference. Given the Trial Court's rulings, there was no reason for O'Quinn to assert

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[2] The Fourteenth Court conclusion that signing an agreement to arbitrate contractual disputes automatically waives Constitutional Due Process rights is addressed below, at pages 22-27. As detailed below, the better view is that arbitrators may not award punitive damages unless the contracting parties expressly agree that the arbitrators may do so.

additional and alternative arguments to support the Trial Court's ruling. Doing so would have wasted the Trial Court's time, as the judge had already ruled. As in ***Williams*** and in ***Boyce Iron Works***, O'Quinn remained free to raise these alternative grounds for the Trial Court's ruling on appeal. O'Quinn did just that. Because these additional grounds for affirmance involve fundamental Due Process rights under the United States and Texas constitutions, it is important for this Court to resolve these issues.

As authority for its conclusion that O'Quinn waived his Constitutional arguments, the Fourteenth Court cited ***Johnson v. Lynaugh***, 800 S.W.2d 936, 939 (Tex. App.--Houston [14th Dist.] 1990, writ denied). However, ***Johnson*** involved waiver by an appellant, not an appellee. As noted, however, O'Quinn was the appellee. O'Quinn respectfully submits that ***Johnson*** simply does not apply here. Instead, ***Williams*** and ***Boyce Iron Works*** apply. Consequently, O'Quinn's Constitutional arguments regarding the ability of arbitrators to award punitive damages is properly before this Court.

B. Because arbitration proceedings fail to meet the Constitutional requirements applicable to punitive damages, arbitrators should not be permitted to award punitive damages: (Germane to Points of Error No. 3, 4, 5 & 6)

The concept of punitive damages has its roots in the English common law and was recognized in early American jurisprudence. Over the past two centuries, courts in our country and in the State of Texas have summarily found that punitive damage awards are Constitutional. Recently, however, the United States Supreme Court and this Court have re-examined the Due Process requirements applicable to punitive damages. The decisions by the Supreme Court and this Court are extremely important because they explain the Due Process requirements which apply to punitive damages. As detailed

below, the Due Process safeguards are conspicuous in their absence from arbitration proceedings.

1. The U.S. Supreme Court's decisions in *Oberg*, *Haslip* and *TXO* demonstrate the Constitutional requirements applicable to awards of punitive damages:

The Supreme Court recently emphasized that Due Process requires the judicial review of jury awards of punitive damages. ***Honda Motor Co. v. Oberg***, 62 U.S.L.W. 4627 (June 24, 1994). In ***Oberg***, the Court struck down an Oregon law which prohibited judicial review of the amount of punitive damages awarded by a jury. ***Id.*** at 4631. In reaching this conclusion, the Supreme Court emphasized the special nature of punitive damages and the "acute danger of arbitration deprivation of property" from punitive damages. ***Id.*** In addition, the Court emphasized that judicial review of punitive damages was "one of the few procedural safeguards which the common law provided against that danger." ***Id.*** The Supreme Court earlier had emphasized the importance of such procedural safeguards in the Court's cases leading to the ***Oberg*** decision.

Earlier, in ***Pacific Mutual Life Ins. Co. v. Haslip***, 499 U.S. 1 (1991), the Supreme Court held that the traditional common law method for assessing punitive damages is not so inherently unfair as to deny Due Process and to be *per se* unconstitutional. The Court went on to hold, however, that unlimited jury discretion -- or unlimited judicial discretion for that matter -- in fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities. ***Id.*** at 18. The Supreme Court stated that the jury's discretion as to punitive damages is constitutional only when a trial court gives the jury reasonable and adequate guidance in making such awards. The Supreme Court noted that under Alabama law, as under the law of most states, punitive damages are imposed for purposes of retribution and deterrence, not to compensate the plaintiff for any injury. The Court observed that the instructions in ***Haslip***

informed the jury that its discretion should be guided by this purpose. ***Id.*** at 19.

In addition, the Supreme Court in ***Haslip*** indicated that punitive damages are constitutional only when the instructions given to the jury describe the standards to be used by the jury in determining whether to impose such awards. Although juries are given significant discretion in assessing punitive damages, that discretion is not unlimited. In ***Haslip***, the Court found that the jury's discretion was confined by appropriate instructions about deterrence and retribution and the state policy concerns sought to be advanced. ***Id.*** at 19-20. The Court found that the jury was instructed that if punitive damages were to be awarded, the jury "must take into consideration the character and degree of the wrong as shown by the evidence and necessity of preventing similar wrong." ***Id.*** at 19.

The Supreme Court in ***Haslip*** held that the discretion vested in the jury under the traditional common law rules may be justified as constitutional by the existence of post-trial procedures for scrutinizing punitive damage awards. ***Id.*** at 20-21. In ***Haslip***, the Court indicated that the procedures established by the Alabama courts ensured meaningful and adequate review by the trial court of punitive damages. The Court noted that the Supreme Court of Alabama had established post-trial procedures for scrutinizing awards of punitive damages. Under this procedure, Alabama trial courts must state in the record the reasons for interfering with a jury verdict, or refusing to interfere with a jury verdict, on grounds of excessiveness of the damages. Among the factors deemed appropriate for an Alabama trial court's consideration are: (1) the culpability of the defendant's conduct, (2) the desirability of discouraging others from similar conduct, (3) the impact upon the parties, and (4) other factors, such as the impact on innocent third parties. ***Id.*** at 21-22. The United States Supreme Court held that this test ensures meaningful and adequate review by the Trial Court whenever a jury has awarded punitive damages. ***Id.*** at 22.

The Court went on to state that the appellate procedures established by the Alabama Supreme Court provide still another check on the jury's or trial court's discretion in awarding punitive damages. ***Id.*** In Alabama, the reviewing court first undertakes a comparative analysis and then it applies detailed substantive standards the Alabama Supreme Court has developed for evaluating punitive awards. In so doing, it reviews the award to ensure that it does not exceed an amount that will accomplish society's goal of punishing and deterrence. ***Id.*** The Court noted that this appellate review makes certain that the punitive damages are reasonable in amount and rational in light of their purpose to punish and deter. The United States Supreme Court noted that the Supreme Court of Alabama has elaborated and refined specific criteria for determining whether a punitive award is reasonably related to the goals of deterrence and retribution. ***Id.*** at 21-22.

The Court concluded that the application of these standards imposes a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages. The Supreme Court held that these standards have real effect when applied by the Alabama Supreme Court to jury awards. The Supreme Court noted that these standards have resulted in the reduction of punitive awards in Alabama and that they provide for a rational relationship in determining whether a particular award is greater than necessary to punish and deter. ***Id.*** at 22.

In ***TXO Production Corp. v. Alliance Resources Corp.***, 113 S. Ct. 2711 (1993), the United States Supreme Court again considered the limits imposed by Due Process on awards of punitive damages. The Court concluded that because West Virginia law requires that punitive damages bear a reasonable relationship to compensatory damages, the magnitude of the potential harm that defendant's conduct could have caused, as well as to the possible harm to the other victims that might have resulted if similar future behavior were not deterred, there was sufficient concern by the West Virginia trial courts with the

reasonableness of the award such so as to meet the substantive requirements of the Due Process Clause. ***Id.*** at 2720-721.

Turning to the procedural component of the due process clause, the Court indicated that the inquiry could include whether the punitive damages award is a result of a fundamentally unfair procedure because the jury was not adequately instructed, whether the award was adequately reviewed by the trial or appellate courts, and whether the defendant had no advance notice that the jury might be allowed to return such a large award or to rely on potential harm as a basis for its calculation. The Court declined to address the first argument as it was not argued or passed on below. The Court concluded that in fact the jury's award was adequately reviewed by the trial court and the appellate court and that defendant had notice under prior law that punitive damages could be awarded under the circumstances of the case. Thus, the United States Supreme Court found no procedural violation of Due Process as a result of the procedures used in West Virginia for the awarding of punitive damages. ***Id.*** at 2720-724.

Significantly, West Virginia law prevents arbitrators from awarding punitive damages. As observed by the West Virginia Supreme Court, "where the damages are genuinely intended to be punitive and bear no reasonable relation to the prevailing party's commercial loss, they are beyond the scope of the arbitrator's power." ***Anderson v. Nichols***, 359 S.E.2d 117, 121 n.1 (W.Va. 1987). In other words, the same court that in ***TXO*** affirmed a punitive damages award rendered by a jury refuses to allow arbitrators to award punitive damages.

As noted above, the Supreme Court most recently held that Due Process requires judicial review of punitive damages awards. ***Honda Motor Co. v. Oberg***, 62 U.S.L.W. 4627 (June 24, 1994). In ***Oberg***, the Supreme Court summarized its rationale as follows:

> Punitive damages an acute danger of arbitrary deprivation of property. Jury instructions typically

> leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences. Judicial review of the amount awarded was one of the few procedural safeguards which the common law provided against that danger. Oregon has removed that safeguard without providing any substitute procedure and without any indication that the danger of arbitrary awards has in any way subsided over time. For these reasons, we hold that Oregon's denial of judicial review of the size of punitive damage awards violates the Due Process Clause of the Fourteenth Amendment.

Id. at 4631. As detailed below, ***Oberg*** requires the reversal of the Opinion below, as the arbitration award of punitive damages violated O'Quinn's Due Process rights.

2. The Texas Supreme Court's decision in *Moriel* also demonstrates the importance of safeguards on awards of punitive damages:

The Texas Constitution contains its own Due Process Clause. TEX. CONST. art I, § 19. In the last several years, the Texas courts have dealt with the constitutionality of awards of punitive damages. *See, e.g.*, ***Browning-Ferris Indus., Inc. v. Lieck***, 845 S.W.2d 926, 943-47 (Tex. App.--Corpus Christi 1993), *rev'd on other grounds*, 37 Tex. Sup. Ct. J. 851 (June 2, 1994); ***Prudential Ins. Co. of Am. v. Jefferson Associates, Ltd.***, 839 S.W.2d 866, 876-77 (Tex. App.--Austin 1992, writ granted). In ***Jefferson Associates***, for example, the Court of Appeals for Austin held that a jury's award of punitive damages did not violate the Due Process Clause of the United States Constitution or the Texas Constitution because many of the

judicial safeguards mentioned in ***Haslip*** also apply in the Texas state courts. The Austin Court of Appeals noted that the opportunity for review by a trial court is available by both the trial court and the appellate courts.

This Court recently addressed the imposition of punitive damages in ***Transportation Ins. Co. v. Moriel***, 37 Tex. Sup. Ct. J. 883 (June 8, 1994). In ***Moriel***, this Court recognized that *punitive damages* are quasi-criminal in nature. The Court noted the close connection between punitive damages and the criminal law. *See* ***Moriel***, 37 Tex. Sup. Ct. J. at 886. This same view formed an important basis for the New York Court of Appeals' decision in ***Garrity v. Lyle Stuart, Inc.***, 353 N.E.2d 793 (1976), which held that arbitrators may not award punitive damages. The Court also noted in ***Moriel*** that the U.S. constitution imposes certain limitations on awards of punitive damages. ***Id.*** at 895-98.

In ***Moriel***, this Court declined to declare unconstitutional or otherwise change the principle that its review of punitive damage awards extends only to determining whether the evidence supporting the award was *legally sufficient*. ***Id.*** at 899.[3] The Texas ***Moriel*** Court held that the evidence presented by Moriel was *legally sufficient* to sustain the judgment that the insurer acted without any reasonable basis in delaying the payment of the claim and thus was liable in tort for breach of the duty of good faith and fair dealing. The Court held, however, that under the clarified definition of *gross negligence*, the insurer cannot be held liable for *punitive damages* unless there is also *legally sufficient* evidence (a) that the defendant's conduct created an *extreme risk of harm*, and (b) that the defendant was consciously indifferent to this *extreme risk of*

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[3] As will become apparent from the following discussion, the evolution of the Due Process protection against excessive and inappropriate punitive damage awards by the U.S. Supreme Court may well require a change in the way Texas courts review punitive damage awards.

harm or was actually aware of this *extreme risk of harm*. ***Id.*** at 891.

The ***Moriel*** Court expressly stated that because the plaintiff did not present legally sufficient evidence of *gross negligence*, the Constitutional issues (*e.g.*, whether the size of the punitive damages award or whether the procedures followed by the trial court violated the defendant's Due Process rights) remained open questions. Nevertheless, in remanding the case for a new trial, this Court reviewed the Constitutional Due Process analyses in ***Pacific Mutual Life Ins. Co. v. Haslip***, 499 U.S. 1 (1991), and in ***TXO Prod. Corp. v. Alliance Resources Corp.***, 113 S.Ct. 2711 (1993). This Court also noted that the Supreme Court had granted writs in ***Oberg***. Although this Court did not explicitly rule on the Constitutional issues, the Court correctly chose to emphasize the need for common law safeguards in order to satisfy Due Process requirements.

In ***Moriel***, this Court first focused on the Texas state court procedures for awarding punitive damages at the trial court level. The Court noted that at the trial court level, the jury instructions used in the trial of the ***Moriel*** case, which appear to have been based upon the Texas pattern jury charge and ***Alamo National Bank v. Kraus***, 616 S.W.2d 908, 910 (Tex. 1981), were more comprehensive than those analyzed by the United States Supreme Court in ***Haslip*** and thus would presumably pass scrutiny under the United States Constitution. 37 Tex. Sup. Ct. J. at 896, n.22.

Constitutional standards also involve post-verdict procedures for scrutinizing the jury's award of punitive damages. This is clearly so at the Trial Court level. While the Supreme Court indicated in ***Haslip*** and ***TXO*** that such post-verdict procedures *should* also exist at the appellate level, the Supreme Court held in ***Oberg*** that such procedures *must* exist. In ***Moriel***, this Court noted that the Supreme Court in ***Haslip*** emphasized a post-verdict procedure where the trial courts are required to scrutinize punitive damage awards, reflecting on the record their reason for upholding or refusing to uphold the

award, ***Moriel***, 37 Tex. Sup. Ct. J. at 896, and also emphasized the fact that the appellate review in Alabama provides an additional check on the jury's or trial court's discretion. ***Id.*** at 896. This Court observed that, by contrast, in Texas a defendant *may* obtain trial court review of a punitive damage award by filing a motion for new trial, but there is no requirement for the trial courts to scrutinize each award and set forth reasons on the record for refusing to disturb a jury's verdict. ***Id.*** at 897. Indeed, Texas trial courts are not even required to rule on a motion for new trial; they may ignore the motion and passage of time will serve to overrule the new trial motion by operation of law. ***Id.*** at 897.

Moving further up the ladder of post-verdict review, the Texas courts of appeal may overturn the jury's verdict and order the case retried only if the verdict is so against the great weight and preponderance of the evidence as to be manifestly unjust. ***Id.*** at 897. Finally, this Court, unlike its counterparts in Alabama and West Virginia and most other States, is precluded from reviewing the evidence supporting a punitive damage award for factual sufficiency. ***Id.*** The ***Moriel*** Court concluded that under Texas procedures, the evidence supporting a punitive damage award is scrutinized less closely on appeal than in some other states. ***Id.*** Indeed, this Court stated that many aspects of the procedures employed up to now by Texas courts do not compare favorably to those examined in ***Haslip*** and ***TXO***. ***Id.*** at 897-98.

Recognizing, as has New York's highest court in ***Garrity***, the close connection between punitive damages and the criminal law, this Court stated that punitive damages are proper only in the most exceptional cases and that the jury discretion which is the hallmark of the common law punitive damage system **must** be complemented by procedural safe-guards that will ensure against (i) excessive or (ii) *otherwise inappropriate* awards. (emphasis added.) ***Id.*** at 897-98. This Court concluded that the Texas procedures for assessing and reviewing punitive damage awards, both at the trial and appellate levels, in some respects may not adequately ensure

that such awards are not grossly out of proportion of the severity of the offense and have some understandable relationship to compensatory damages. *Id.* at 898.

In an effort to address these shortcomings, this Court articulated procedural standards for the Trial Courts in this State to apply with respect to claims for *punitive damages*. Without reaching the constitutional questions, this Court announced, pursuant to its authority under the common law (the same foundation used by the New York Court of Appeals in *Garrity* and other courts to prohibit arbitrators from awarding punitive damages[4]), two changes in the procedures by which punitive damages may be awarded in the Texas state courts. The changes are:

a. The issue as to the amount of punitive damages must be bifurcated from the remaining issues in the trial of the Cause. 37 Tex. Sup. Ct. J. at 898-99. This Court concluded that the current procedures are not adequate and thus adopted the requirement of bifurcated trials in punitive damages cases.

b. The courts of appeal are already obligated, when reversing a jury's award on insufficiency grounds, to detail the evidence in their opinions and explain why the jury's finding is factually insufficient or so against the great weight and preponderance of the evidence as to be manifestly unjust. ***Pool v. Ford Motor Co.***, 715 S.W.2d 629, 635 (Tex. 1986). In ***Moriel***, this Court extended this obligation. Now, the reviewing courts of appeal are also obligated to detail the evidence in their opinions when they are affirming an award of

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[4] *See* ***Shaw v. Kuhnel & Associates, Inc.***, 698 P.2d 880 (N.M. 1985); ***United States Fidelity & Guaranty Co. v. DeFluiter***, 456 N.E.2d 429 (Ind. Ct. App. 1983); ***School City of East Chicago, Indiana v. East Chicago Federation of Teachers***, 422 N.E.2d 656 (Ind. Ct. App. 1981).

> punitive damages over a challenge that it is based on insufficient evidence or against the great weight and preponderance of the evidence. This Court held that this procedure will ensure careful appellate review of the punitive award and allow the Texas Supreme Court to determine whether the court of appeals correctly applied the ***Kraus*** factors. 37 Tex. Sup. Ct. J. at 899.

Given ***Oberg*** and the Due Process requirement of judicial review, additional changes to Texas procedures may be needed to ensure against excessive or otherwise inappropriate punitive damage awards.

3. The safeguards emphasized by the United States Supreme Court and the Texas Supreme Court in *Oberg*, *TXO*, *Haslip*, and *Moriel* are completely absent from arbitration proceedings:

There is nothing in an arbitration proceeding to ensure against excessive or otherwise inappropriate punitive damage awards. None of the protection -- not a single one -- discussed by the Supreme Court in ***Oberg***, ***Haslip*** and ***TXO***, or discussed and required by this Court in ***Moriel***, is present in an arbitration proceeding. There is no voir dire of the potential arbitrators to determine their biases against the defendant or their feelings as to the award of punitive damages. Discovery is abbreviated, which can result in the defendant being denied the opportunity to develop the facts necessary to refute the plaintiff's allegations. There are few evidentiary rules applicable to an arbitration proceeding; virtually everything is admissible into evidence. Hence, there is no procedure for controlling and limiting the evidence submitted to the Arbitrators and the statements made by the parties and their advocates to the Arbitrators. Virtually anything can be done or said during an arbitration hearing -- and apparently was in this case.

There is no procedure whereby the arbitrators are provided, either by the Trial Court or the American Arbitration Association or some other supervising organization, instructions that articulate the purposes of punitive damages. Unlike juries, arbitrators are not instructed that punitive damages are to punish and to deter the defendant, nor are arbitrators instructed as to when and under what circumstances the law allows the award of punitive damages.

Because punitive damages are so subjective, the United States and Texas constitutions require judicial supervision by the trial or appellate courts. However, one of the underlying

theories of arbitration is that there should be minimal court review and supervision. Indeed, the Court of Appeals in this case deferred to the arbitrators as to "procedural matters such as the sufficiency of Kline's pleadings" and then presumed "adequate evidence to support the award." Op. at 10. Because there is rarely a record of the arbitration proceedings, arbitrators sometimes choose not to state their reasoning or the bases for their decision, making it is almost impossible for reviewing courts to supervise the proceedings or the arbitrators' award. While this seems acceptable for compensatory damages, allowing arbitrators to award *punitive* damages will lead to unpredictable, uncontrollable, non-reviewable awards of punitive damages.

There is no procedure applicable to arbitration awards for the trial court or the appellate courts to review the testimony and documents considered by the arbitrators or the basis on which the arbitrators made their award of punitive damages. Similarly, there is no procedure for the trial court or the appellate court to determine whether the award of punitive damages by the arbitrators is excessive taking into account the factors articulated by this Court: (i) whether the exemplary damages are reasonably proportional to actual damages, (ii) the nature of the wrong, (iii) the character of the conduct involved, (iv) the culpability of the wrongdoer, (v) the situation and sensibilities of the parties, and (vi) the extent to which the wrongful conduct offends a public sense of justice and propriety. *See, e.g., **Alamo National Bank v. Kraus***, 616 S.W.2d 908, 910 (Tex. 1981).

4. The arbitration proceedings at issue in this case were even worse than usual in terms of the absence of Due Process safeguards against punitive damages:

Due Process of law applies in arbitration proceedings just as in other legal proceedings. This requires fair notice of the claims made by the other party. In this case, Kline's pleadings

and submission to the arbitrators gave O'Quinn absolutely no notice of any claim for punitive damages. By letter of May 28, 1991 from Kline's counsel to the American Arbitration Association, Kline's counsel transmitted the Original Petition to the AAA as the definition of Kline's claim. In her Original Petition, Kline alleged breach of contract, breach of an alleged tort duty of good faith, and breach of an alleged fiduciary duty. Kline pled and prayed only for actual damages, *i.e.*, economic losses. Kline did not plead or pray for exemplary damages. Indeed, there is no mention -- not one single word -- in the Original Petition about exemplary damages. Moreover, Kline did not plead the existence of a separate and distinct tort that caused separate actual damages in tort, which is required by Texas law for the recovery of punitive damages.

Kline requested punitive damages only at the conclusion of the arbitration, *i.e.*, only after the evidence had been presented. In such a situation, the arbitrators' award of punitive damages cannot stand because it exceeded their authority and constitutes an award on a matter not submitted. *See* TEX. REV. CIV. STAT. ANN. art. 237(A)(3) (award to be vacated when arbitrators exceed their authority) & art. 238(A)(2) (award to be modified when arbitrators award on a matter not submitted).

In similar cases involving a belated claim for punitive damages other courts have vacated the arbitrator's award of punitive damages. For example, in ***Hotel & Rest. Employees & Bartenders Int'l Union v. Michelson's Food Serv., Inc.***, 545 F.2d 1248, 1254 (9th Cir. 1976), the court held that the failure to request punitive damages from the onset prevented the assertion of such a claim in arbitration. In ***Michelson's***, the aggrieved employee waited until the day the arbitration hearing was to begin to assert a claim for punitive damages. The Ninth Circuit refused to allow the arbitrator to award such damages, observing:

> What we do say is that the remedies here claimed are not usually appropriate in breach of contract cases

> [citation omitted] and that such extraordinary remedies are not available at the arbitration stage unless they have been put in issue from the beginning. We express no opinion as to what the arbitrator's powers would be in such a case; it is not before us.

Michelson's, 545 F.2d at 1254. *See also* ***Totem Marine Tug & Barge, Inc. v. North American Towing, Inc.***, 607 F.2d 649, 651-652 (5th Cir. 1979) (vacating arbitration award of charter hire damages where such damages were not requested in the parties' submission of claims to the arbitrators).

The Texas General Arbitration Act requires the courts to modify or correct an award if the arbitrators issue an award on "a matter not submitted to them..." TEX. REV. CIV. STAT. ANN. art. 238(A)(2). This Court (and most others) consider the parties' letters and pleadings which are provided to the arbitrators in determining the scope of the matters submitted to arbitration. *See, e.g.,* ***Gulf Oil Corp. v. Guidry***, 327 S.W.2d 406, 407-11 (Tex. 1959) (considering various papers and correspondence among the arbitrators); ***USX Corp. v. West***, 781 S.W.2d 453, 455 (Tex. App.--Houston [14th Dist.] 1989, no writ) (considering papers submitted to the American Arbitration Association); *see also* ***Totem Marine***, 607 F.2d at 651-52 (considering letter to arbitrator in determining what issues were submitted to arbitration). Hence, Kline's statement of her claims via her submissions to the arbitrators is extremely important -- those papers determine what was submitted to the arbitrators. The Trial Court, referring in part to Kline's own statement of the issues submitted to the Arbitrators, correctly modified the Award to vacate the portion thereof where the Arbitrators exceeded their authority. However, the Court of Appeals incorrectly ignored Kline's own submissions to the arbitrators, suggesting that Kline's own submission to the arbitrators constitutes "extrinsic evidence" which need not be considered. Op. at 10.

The Fourteenth Court's refusal to examine the submissions to the Arbitrators shows a complete absence of judicial review,

as is required under ***Oberg***. The injustice of the Fourteenth Court's decision is underscored when one considers its conclusion that O'Quinn had no fiduciary duty to Kline. Op. at 17-18. In other words, the Fourteenth Court essentially rejected any possible basis for an award of punitive damages. Nonetheless, its deference to the arbitrators and its refusal to review the award led it to reinstate an award of punitive damages which, by its own analysis, had absolutely no legal basis.

5. Contracting parties do not waive their Due Process rights with respect to punitive damages simply by agreeing to arbitrate -- unless they expressly agree to allow arbitrators to award punitive damages:

Arbitration is entirely consensual. Unless there is a *contract* containing an arbitration provision, there is no arbitration. *Contracting* parties elect to submit their future disputes to arbitration for the purpose of a private, speedy and fair resolution, without the delays and rigidities of a court trial. They expect their arbitrators to award the type of relief that the law allows for breach of *contract*. They do not expect the arbitrators to award punitive damages, particularly when the law does not allow the recovery of punitive damages for *breach of contract*. *E.g.*, ***Belko v. AVX Corp.***, 251 Cal. Rptr. 557, 560-61 (Cal. Ct. App. 1988); ***International Union of Operating Engineers v. Mid-Valley, Inc.***, 347 F. Supp. 1104, 1109 (S.D. Tex. 1972).

It is one thing for *contracting* parties to submit to arbitration the issue of *contractual* **compensatory** damages, which are largely based on objective criteria. But **punitive** damages are entirely different. Punitive damages are quasi-criminal and subjective in nature. As stated by the Supreme Court in ***Oberg*** and as this Court held in ***Moriel***, the jury discretion that is the hallmark of the common law punitive damage system **must** be complemented by procedural safe-

guards that will ensure against excessive or otherwise inappropriate awards. It is inconceivable, and simply cannot be the case, that when parties submit their *contractual* disputes to arbitration they face the risk of having punitive damages awarded against them without any substantive and procedural safeguards to ensure against excessive or inappropriate punitive damage awards.

Parties do not "waive" their fundamental substantive and procedural rights simply by agreeing that their future *contract* disputes will be resolved by arbitration. As one federal court in Texas explained:

> Contracting parties do not normally agree to assess exemplary damages for a breach of contract. Such damages being punitive in nature are rare in contract law. Contractual consent to so drastic a "remedy" for simple breach cannot be implied. ***Therefore, a arbitrator's assessment of punitive damages must be grounded in express language.*** In this case, neither the contract clause nor the simple question submitted suggest authority for exemplary damages.

Mid-Valley, 347 F. Supp. at 1109 (emphasis added). Under this approach, arbitrators may award punitive damages only if expressly allowed by the parties' agreement.

The view adopted in ***Mid-Valley*** is entirely consistent with the few Texas cases on point. In ***Grissom v. Greener & Sumner Constr. Co.***, 676 S.W.2d 709 (Tex. App.--El Paso 1984, writ ref'd n.r.e.), for example, the parties expressly agreed to submit contract and tort claims, and all pending claims for damages, including punitive damages, to arbitration. In ***USX Corp. v. West***, 781 S.W.2d 453 (Tex. App.--Houston [1st Dist.] 1989, no writ), the court refused to require the parties to arbitrate all claims, instead observing that the question of whether tort claims and claims for punitive damages should be submitted to arbitration was initially a procedural matter for the arbitrations. Unlike this case or ***Grissom***, however, ***USX*** did not deal with

the review of an arbitration award. Rather, ***USX*** dealt with procedural skirmishes in connection with the submission of the case to arbitration. ***Mid-Valley***, ***Grissom***, and ***USX*** together suggest that arbitrators may award punitive damages only where the parties have expressly granted such authority. O'Quinn never agreed to allow the arbitrators such unlimited discretion.

In addition to the above, there are additional reasons for requiring the parties' express consent to allow arbitrators to award punitive damages. For one thing, the exceptional and quasi-criminal nature of punitive damages must weigh heavily in determining whether there has been a waiver of Due Process rights. In connection with a waiver of Fourth Amendment rights (which protect against criminal penalties), the Texas courts require that the prosecution "show by clear and convincing evidence that the consent to search was freely and voluntarily given." The prosecution must show the consent was "positive and unequivocal." *E.g.*, ***Reyes*** . ***State***, 741 S.W.2d 414, 430 (Tex. Crim. App. 1987).

Given the close connection between criminal law and punitive damages, the waiver standard applicable to other constitutional safeguards against criminal penalties should control the determination of whether a contracting party has waived his or her constitutional safeguards against an excessive award of punitive damages by an arbitrator. As previously noted, this Court recently emphasized the close connection between punitive damages and the criminal law. ***Moriel***, 37 Tex. Sup. Ct. J. at 886-87. As indicated in ***Moriel*** and ***Oberg***, the special nature of punitive damages suggests that a waiver of the Due Process safeguards against excessive punitive damages cannot be lightly inferred. Compliance with the express consent rule, which requires that a party expressly agree that an arbitrator may assess punitive damages, should also satisfy Due Process requirements. Accordingly, O'Quinn respectfully requests that this Court adopt and apply the express consent rule in determining whether the arbitrators were authorized to award punitive damages.

Another significant reason for applying the express consent rule can be found in this Court's recent indemnity cases. In ***Ethyl Corp. v. Daniel Constr. Co.***, 725 S.W.2d 705 (Tex. 1987), this Court adopted the "express negligence doctrine," which requires that a party seeking indemnity from its own negligence "must express that intent in specific terms within the four corners of the contract." ***Id.*** at 707-708. This rule is intended to protect unsuspecting indemnitors from indemnity claims where the indemnitee was also negligent, in order to avoid results not reasonably expected by the indemnitor. More recently, this Court extended the conspicuousness requirement of ***Ethyl*** to cover "first party" exculpatory clauses amounting to a release of claims for future negligent conduct. ***Dresser Ind., Inc. v. Page Petroleum, Inc.***, 853 S.W.2d 505, 510-11 (Tex. 1993). Such requirements help to ensure that "a reasonable person against whom a clause is to operate" will have noticed it. ***Id.*** at 511.

As previously noted, contracting parties generally do not expect that arbitrators may award punitive damages. *E.g.*, ***International Union of Operating Engineers v. Mid-Valley, Inc.***, 347 F. Supp. 1104, 1109 (S.D. Tex. 1972). As with indemnity and exculpatory clauses, parties who agree to arbitration ought to receive fair notice of what may be arbitrated. Given the exceptional nature of punitive damages and their general unavailability in contract cases, an express consent rule is needed to avoid surprise and unexpected results. In other words, arbitrators should not be deemed to have the authority to award punitive damages unless the parties expressly agree that they may do so. Such a rule encourages the use of arbitration by avoiding unexpected results and surprise. It also protects against constitutional violations by arbitration awards not subject to any judicial review, as otherwise required by ***Oberg***.

Other state courts have considered the extent to which arbitrators may award punitive damages.[5] Some courts flatly refuse to allow arbitrators such unlimited power. *E.g.*, ***Garrity v. Lyle Stuart, Inc.***, 353 N.E.2d 793 (N.Y. 1976). Other courts refuse to allow arbitrators to award punitive damages unless the parties expressly agree that they may do so. In other words, these latter courts impose an "express consent" requirement before arbitrators may award punitive damages. *E.g.*, ***Edward Elec. Co. v. Automation, Inc.***, 593 N.E.2d 833, 842-43 (Ill. App. Ct.), *appeal denied*, 602 N.E.2d 450 (Ill. 1992) (vacating severable award of punitive damages); ***Complete Interiors, Inc. v. Behan***, 558 So.2d 48, 50-51 (Fla. Dist. Ct. App.), *review denied*, 570 So.2d 1303 (Fla. 1990); ***Belko v. AVX Corp.***, 251 Cal. Rptr. 557, 560-61 (Cal. Ct. App. 1988). In addition, numerous federal courts have considered this issue and have concluded that arbitrators cannot award punitive damages absent an express agreement to that effect. *E.g.*, ***Howard P. Foley Co. v. International Brotherhood of Electrical Workers***, 789 F.2d 1421, 1424 (9th Cir. 1986); ***Baltimore Regional Joint Bd. v. Webster Clothes, Inc.***, 596 F.2d 95, 98 (4th Cir. 1979); ***Westmoreland Coal Co. v. United Mine Workers***, 550 F. Supp. 1044, 1047-48 (W.D. Va. 1982); ***Mid-Valley***, *supra*, 347 F. Supp. at 1109-10.

It is significant to note that the cases adopting the express consent rule avoid the nettlesome constitutional issues now before this Court. As in ***Moriel***, this Court remains free to adopt and apply the same "express consent" rule. As noted above, this rule is consistent with prior Texas cases (i.e., ***Mid-Valley***, ***Grissom*** and ***USX***).

Applying the express consent rule in this case requires a reversal of the Opinion below and affirmation of the Trial Court's Judgment. As set forth in the Opinion below, the arbitration clause failed to expressly allow arbitration of

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[5] These decisions, however, generally were made prior to the decisions in ***Oberg***, ***TXO***, and ***Haslip***. Hence, the Due Process requirements may require even stricter judicial review.

punitive damages, let alone any express reference to tort claims. Op. at 7. Under the express consent rule, the award of punitive damages exceeded the arbitrators' authority and was correctly set aside by the Trial Court. *See* TEX. REV. CIV. STAT. ANN. art 237 & 238 (Vernon 1973) (requiring the court to vacate or modify an arbitration award where the arbitrators exceed their authority or have awarded on a matter not submitted); ***Mid-Valley***, *supra*; ***Grissom v. Greener & Sumner Constr. Co.***, 676 S.W.2d 709 (Tex. App.--El Paso 1984, writ ref'd n.r.e.) (affirming arbitration award of punitive damages where the parties expressly agreed to submit this issue to arbitration). A rule disallowing punitive damages in arbitration unless the parties have expressly agreed otherwise is consistent with the constitutional limitations of ***Oberg***, ***TXO***, ***Haslip***, and ***Moriel***, yet is also consistent with ***Grissom***, ***Mid-Valley***, and the express consent cases. It is unrealistic to assume that when parties agree to arbitrate future disputes arising out of their contract they thereby intend to "waive" all of the various Constitutional and public policy protection afforded by the law in the absence of any express wording to that effect.

In this case, the award of punitive damages by the arbitrators violated the requirements of the Due Process Clause of the United States Constitution and the Due Course of Law provision of the Texas Constitution. As such, the Trial Court's decision to modify the Award to eliminate the punitive damages purportedly imposed on O'Quinn was correct because the award of punitive damages violated the Due Process Clauses of the United States and Texas Constitutions. *See, **Oberg***, 62 U.S.L.W. at 4631. Accordingly, O'Quinn requests that this Court reverse the Opinion of the Court of Appeals and affirm the Judgment of the Trial Court.

C. Arbitrators should not be permitted to award punitive damages as a matter of public policy: (Germane to Points of Error No. 7, 8 & 9)

Even if this Court concludes that arbitration proceedings are constitutionally acceptable, this Court should hold that public policy considerations prohibit arbitrators from awarding punitive damages, at least unless the parties have otherwise expressly agreed. In ***Garrity v. Lyle Stuart, Inc.***, 353 N.E.2d 793 (N.Y. 1976), the New York Court of Appeals examined this precise issue. The *Garrity* Court held, not on constitutional grounds, but as a matter of public policy, that an arbitrator has no power to award punitive damages, even if the parties had attempted to bestow that power on the arbitrator. The court held that punitive damages is a sanction reserved to the state, a public policy of such magnitude as to call for judicial intrusion to prevent its contravention. ***Id.*** at 794. Because enforcement of an award of punitive damages as a purely private remedy would violate strong public policy, the New York Court of Appeals held that an arbitrator's award which imposes punitive damages should be vacated. ***Id.*** at 794.

The factors considered by the New York Court of Appeals which constituted the bases for its conclusion were:

> (1) At common law, punitive damages are available only in a limited number of instances. Punitive damages are allowed in cases where the wrong complained of is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant, but to deter him, as well as others who might otherwise be so prompted, from indulging in similar conduct in the future. It is a so-called exemplary "remedy," not a private compensatory remedy. ***Id.*** at 795.
>
> (2) Punitive damages are not available for mere breach of contract, for in such a case, only a

private wrong and not a public right is involved. *Id.* at 795. Even if there was a so-called "malicious" breach of the contract, that would not permit the imposition of punitive damages. Punitive sanctions are reserved to the State. This is a public policy of such magnitude as to call for judicial intrusion. *Id.* at 796.

(3) The evil of permitting an arbitrator, whose selection is often restricted or can be manipulated by the party in a superior bargaining position, to award punitive damages is that it displaces the court and the jury, and therefore the State, as the engine for imposing a social sanction. Actual damages are measurable against some objective standard. But punitive damages take their shape from the subjective criteria involved in attitudes toward correction and reform, and courts do not readily accept the delegation of that kind of power. Where punitive damages have been allowed for those torts which are still regarded somewhat as public penal wrongs, as well as actionable private wrongs, they have rather close judicial supervision. *Id.* at 796.

(4) Standards, such as whether the award of punitive damages was irrational or unjust, are subjective and afford no practical guidelines for the arbitrator and little protection against abuse. Moreover, even if such standards were imposed on the arbitration proceeding in an effort to install fairness to the system, the imposition of the standards would be contrary to the sound development of arbitration law. *Id.* at 796.

(5) The parties to arbitration agree to the substitution of a private tribunal for purposes of deciding their disputes without the expense, delay, and rigidities of traditional courts. If arbitrators are allowed to impose punitive damages, the usefulness of

arbitration will be destroyed. It will become a trap for the unwary, given the eminently desirable freedom from judicial overview of law and facts. It would mean that the scope of the determination by arbitrators, by the license to award punitive damages, would be both unpredictable and uncontrollable. *Id.* at 796.

(6) In imposing penal sanctions in private arrangements, a tradition of the rule of law in organized society is violated. One purpose of the rule of law is to require that the use of coercion be controlled by the State. In a highly developed commercial and economic society, the use of private force is not the danger, but the uncontrolled use of coercive economic sanctions in private arrangements is. The power to punish is a monopoly of the State and not that of any private individual. *Id.* at 796-797.

(7) The parties usually never agreed, or, for that matter, even consider punitive damages as a possible sanction for breach of an agreement. Even if the parties had sought to agree that the arbitrators could award punitive damages, the law does not and should not permit private persons to submit themselves to punitive sanctions of the order reserved to the State. The freedom of contract does not embrace the freedom to punish, even by contract. *Id.* at 797.

(8) Under common law principles, there is eventual supervision of jury awards of punitive damages, in the singularly rare cases where they are permitted, by the trial court's power to change awards and by the appellate court's power to modify such awards.

Other states have adopted this same holding for public policy reasons. For example, in ***Shaw v. Kuhnel & Associates,***

Inc., 698 P.2d 880, 881 (N.M. 1985), the Supreme Court of New Mexico held, citing ***Garrity***, that an Arbitrator should not be given authority to award punitive damages; this power is reserved to the Courts. In ***United States Fidelity & Guaranty Co. v. DeFluiter***, 456 N.E.2d 429 (Ind. Ct. App. 1983), the Indiana Court of Appeals held that because arbitration arises out of a contractual relationship, punitive damages are unavailable because parties may not contract to benefit from or be penalized by punitive damages. ***Id.*** at 432. *See also*, ***School City of East Chicago, Indiana v. East Chicago Federation of Teachers***, 422 N.E.2d 656, 663 (Ind. Ct. App. 1981).

The Trial Court's decision to modify the Award to eliminate the punitive damages purportedly imposed on O'Quinn was correct because the award of punitive damages violates important public policy concerns of the State of Texas. The policy concerns recognized by New York's highest court are just as true in Texas as they are in New York. Just as the New York Court of Appeals recognized, parties agree to arbitration for purposes of deciding their disputes without the expense, delay, and rigidities of traditional courts. If arbitrators are allowed to impose punitive damages, the usefulness of arbitration will be destroyed. It will mean, just as the New York Court of Appeals predicted, that the scope of the determination by arbitrators, by virtue of the license to award punitive damages, will become unpredictable and uncontrollable. Indeed, if arbitrators can award punitive damages without even the judicial supervision over jury awards of punitive damages, and without the judicial review required with respect to jury awards, contracting parties will seek to avoid arbitration. On the other hand, if as a matter of public policy Arbitrators are not allowed to award punitive damages, arbitration will become an even more effective and favored means for resolving disputes between contracting parties.

III. The Court of Appeals erred in holding that the arbitrators were authorized to award punitive damages: (Germane to Point of Error Nos. 1, 9, 10, 11, 12, 13 & 14)

A. Arbitrators must act within the limitations imposed by the parties' agreement and the law (Germane to Points of Error Nos. 1, 10 & 11):

All arbitration proceedings in this State, whether conducted pursuant to the common law, the Texas General Arbitration Act, or the Federal Arbitration Act, arise out of consensual understandings. Article 224 of the Texas General Arbitration Act makes it clear that a written agreement is required to compel parties to arbitrate their disputes and the terms of the written agreement govern which disputes are submitted to arbitration. TEX. REV. CIV. STAT. ANN. art 224 (Vernon Supp. 1993). Because arbitration provisions are in derogation of a right of trial by jury, arbitration is not extended beyond the terms of the contract or to issues and matters not covered thereby. *See, e.g.,* ***Seale v. Roy M. Mitchell Contracting Co.***, 321 S.W.2d 149, 150 (Tex. Civ. App.--Austin 1959, writ ref'd). Texas courts consistently hold that the parties must have *specifically agreed* to arbitrate the particular matter in dispute. *See, e.g.,* ***Valero Energy Corp. v. Wagner & Brown***, 777 S.W.2d 564, 566 (Tex. App.--El Paso 1989, writ denied). Similarly, the United States Supreme Court has admonished that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." ***United Steelworkers v. Warrior & Gulf Navigation Co.***, 363 U.S. 574, 582 (1960).

Although it is often assumed that an arbitration award is entitled to great deference by the courts, this assumption is untrue with respect to the authority and jurisdiction of the arbitrators. An arbitrator's decision as to the scope of his authority is subject to the scrutiny of the courts to ensure that the arbitrator acted properly. *E.g.,* ***E. I. Du Pont de Nemours & Co. v. Local 900***, 968 F.2d 456, 458 (5th Cir. 1992); ***Babcock &***

Wilcox Co. v. PMAC, Ltd., 863 S.W.2d 225, 230 (Tex. App.--Houston [14th Dist.] 1993, writ denied).

The Texas General Arbitration Act provides for the determination of whether the arbitrators exceeded their authority or awarded on a matter not submitted, at least to the extent of determining whether the arbitrators acted within the bounds of their authority. Article 237 requires that an award be vacated when the arbitrators exceed their authority and Article 238 requires the modification or correction of an award when the arbitrators make an award on a matter not submitted to them. TEX. REV. CIV. STAT. ANN. arts. 237 & 238 (Vernon 1973). Review of the award is so important that, even where the parties expressly waive the right to judicial review of an arbitration award, the courts still have the authority to review the award under Articles 237 and 238. *Grissom v. Greener & Sumner Constr., Inc.*, 676 S.W.2d 709, 711 (Tex. App.--El Paso 1984, writ ref'd n.r.e.).

B. Kline's own pleadings and demand for arbitration show that she did not submit the issue of punitive damages to the arbitrators (Germane to Points of Error Nos. 1, 10, 11, 12, 13 & 14):

Due Process of law applies in arbitration proceedings just as in other legal proceedings. O'Quinn was entitled to fair notice of the claims made against him. By letter of May 28, 1991 from Kline's counsel to Ms. Tamme S. Wilkes of the American Arbitration Association, Kline's counsel transmitted the Original Petition to the American Arbitration Association as the definition of Kline's claim. In her Original Petition, Kline alleged breach of contract, breach of an alleged tort duty of good faith, and breach of an alleged fiduciary duty. Kline pled and prayed only for actual damages, *i.e.*, economic losses. Kline did not plead or pray for exemplary damages. Indeed, there is no mention -- not one single word -- in the Original Petition about exemplary damages.

Moreover, Kline did not plead the existence of a separate and distinct tort that caused separate actual damages in tort. Each of these elements is required by Texas law before a claimant can recover punitive damages. Lawyers who are trained to recognize the necessary elements of a claim for punitive damages simply could not have known from Kline's pleadings that she was thinking about attempting to recover punitive damages. The law does not require them to guess as what Kline might be secretly planning.

The Texas General Arbitration Act, however, requires the courts to modify or correct an award if the arbitrators issue an award on "a matter not submitted to them..." TEX. REV. CIV. STAT. ANN. art. 238(A)(2). Both the Fourteenth Court and the Texas Supreme Court have considered the writings submitted by the parties to the Arbitrators in determining the scope of the matters submitted to arbitration. *See* ***USX Corp. v. West***, 781 S.W.2d 453, 455 (Tex. App.--Houston [14th Dist.] 1989, no writ) (considering papers submitted to the American Arbitration Association); ***Gulf Oil Corp. v. Guidry***, 327 S.W.2d 406, 407-11 (Tex. 1959) (considering various papers and correspondence among the arbitrators). Hence, Kline's statement of her claims via her submissions to the arbitrators is extremely important.

The Trial Court found that the issue of punitive damages was not submitted to the arbitrators. [Tr. 380] Both ***USX*** and ***Gulf Oil*** make it clear that the Trial Court properly considered Kline's submissions to the AAA. In the absence of a transcript of the arbitration proceedings, a reviewing court should defer to the Trial Court on the question of whether, despite Kline's submissions, the parties nonetheless submitted the issue of punitive damages to arbitration. Despite the Fourteenth Court's statement to the contrary, it need not follow ***House Grain Co. v. Obst***, 659 S.W.2d 903, 906 (Tex App.--Corpus Christi 1983, writ ref'd n.r.e.), and "presume adequate evidence to support the award." As pointed out in Justice Ellis' dissent below, ***Obst*** created this supposed presumption without any supporting authority from this Court. Moreover, ***Gulf Oil***

(which was decided by this Court) suggests that the Texas courts should consider various papers, including correspondence, to determine whether a particular issue was submitted to arbitration and whether the arbitrators exceeded their authority. ***Gulf Oil***, 327 S.W.2d at 407-11.

Finally, it is important to note that the appellant -- in this case Kline -- generally bears the risk of having an inadequate record. *See* ***Christiansen v. Prezelski***, 782 S.W.2d 842, 843 (Tex. 1990); TEX. R. APP. P. 50(d). Hence, if an appellant (such as Kline) fails to present a complete statement of the facts, the appellate court cannot properly determine that the Trial Court's ruling was incorrect. *See id.*, 782 S.W.2d at 843-44. In the past, the Court of Appeals had emphasized that the appellant, not the appellee, bears the burden of submitting an adequate record to reverse the trial court's handling of an arbitration award. ***Atrium Westwood VIII Venture v. Barrick Westwood L.P.***, 693 S.W.2d 699, 700-01 (Tex. App.--Houston [14th Dist.] 1985, no writ). Accordingly, the Fourteenth Court's presumption of evidence to support the award, a presumption which runs contrary to Kline's own submission to the AAA and ***Westwood*** was in error. This Court should rely on Kline's submissions to the arbitrators and defer to the Trial Court's findings.

C. The parties' agreement precluded the submission of the question of punitive damages (Germane to Points of Error Nos. 1, 10 & 11) :

The dispute submitted to the arbitrators arose out on a written agreement among Kline, O'Quinn and Pearson relating to the apportionment of legal fees received from several cases. In this agreement, there was an arbitration provision which provides as follows:

> In the event that a dispute arises among Parties that cannot be amicably resolved or, Parties have elected to terminate this Agreement and are unable to reach

> an agreement to that end, said dispute shall be determined by arbitration conducted in the City of Houston, State of Texas, in accordance with the rules then in force of the American Arbitration Association. [Tr. 34]

By this agreement, O'Quinn, Kline and Pearson did not expressly, or even by implication, grant authority to the Arbitrators to award exemplary damages in connection with disputes arising out of an alleged breach of the contract in dispute.

This arbitration provision is fairly narrow -- it avoids the broad terminology frequently found in arbitration provisions that the parties submit "any and all claims, demands, disputes, controversies, or other matters pertaining to the written agreement in issue, whether or not arising independently out of the written agreement, and whether in contract, tort or otherwise." *See* ***Babcock & Wilcox***, 863 S.W.2d at 230 (listing several examples of broad arbitration clauses, each of which starts with "any dispute" or the like). The use of the narrow arbitration provision in the agreement among Kline, O'Quinn, and Pearson thus demonstrates that the parties intended for the arbitrators to resolve contractual disputes, not to award exemplary damages for alleged activities outside the scope of the contract.

Despite the Fourteenth Court's view that the arbitration clause is broad, it is quite similar to the one at issue in ***Central Texas Clarklift, Inc. v. Simmons***, 540 S.W.2d 745, 746-47 (Tex. Civ. App.--Waco 1976, no writ). That case involved the following arbitration clause:

> Upon the occurrence of a dispute relative to any provision of this Agreement or the application of any provision of this Agreement or if a price determination is required by any Paragraph herein, the same shall be submitted to arbitration under the terms and conditions of the "Texas General Arbitration Act."

540 S.W.2d at 746. In ***Simmons***, the plaintiff had sold a business. As part of the sale contract, Simmons also agreed to a covenant not to compete. When the buyer learned of Simmons' new employment with Trans Lift, the buyer sent letters and made telephone calls to Trans Lift asserting that Simmons was violating the covenant not to compete. 540 S.W.2d at 746. Simmons sued the buyer for tortious interference. The court of appeals held that the claim for tortious interference was not within the scope of the above arbitration clause, as the alleged intentional tort was not a dispute relating to the contract. ***Id.*** at 747.

The arbitration provision in the contract among Kline, O'Quinn and Pearson was clearly no broader than that at issue in ***Simmons***. Moreover, the arbitration clause in this case clearly did not authorize the arbitrators to award punitive damages for activities for which punitive damages may not be awarded under Texas law, *i.e.*, for breach of contract. In this case, as discussed below, the only alleged activities that could have possibly given rise to punitive damages would have been activities outside the agreement. As in ***Simmons***, the arbitration provision between O'Quinn and Kline did not specifically authorize the arbitrators to award punitive damages for outside-the-contract activities. Because of the unique and harsh nature of punitive damages, it is unrealistic to assume that the parties intended the arbitration provision to authorize the arbitrators to award punitive damages for outside-the-contract activities and to waive their Due Process rights to judicial review and other common law safeguards.

While the issue is not settled in Texas, the El Paso Court of Appeals has held that the arbitrators have the power to award punitive damages -- where the parties have ***expressly*** submitted the issue to the arbitrators. ***Grissom v. Greener & Sumner Constr., Inc.***, 676 S.W.2d 709, 711 (Tex. App. -- El Paso 1984, writ ref'd n.r.e.). But the ***Grissom*** decision is not applicable here because the parties here did not expressly submit the issue to the arbitrators. It is respectfully that, as a matter of law, arbitrators should not be allowed to award

punitive damages unless the parties have specifically and expressly granted that authority to the arbitrators. *See, e.g.,* ***International Union of Operating Engineers v. Mid-Valley, Inc.***, 347 F. Supp. 1104, 1108-10 (S.D. Tex. 1972).

In its Opinion, the Court of Appeals relied heavily on ***USX Corp. v. West***, 781 S.W.2d 453 (Tex. App. -- Houston [1st Dist.] 1989, no writ). In ***USX***, the First Court refused to mandamus Judge David West to require him to grant a motion to compel arbitration because he had already granted a motion to stay pending arbitration. ***USX***, 781 S.W.2d at 454-56. In effect, the court reviewed the pleadings and submissions to the arbitrators, concluding that they were sufficient to submit various contract and tort claims, and various types of damages, to the arbitrator. The court then left it to the parties and the arbitrator to address pleading issues. ***Id.*** at 456-57.

Significantly, however, the ***USX*** case did not address the basic question of whether an award of punitive damages is constitutional or otherwise prohibited by public policy. Similarly, the ***USX*** case did not address the applicability of the express consent rule. Moreover, the ***USX*** case did not address questions involving the determination of what was submitted to arbitration; instead ***USX*** involved what should be submitted. Deference in favor of arbitration at the early stages of a dispute makes sense, as it seems likely to further the use of arbitration. After an arbitration proceeding is concluded, however, the Texas General Arbitration Act requires the consideration of what was submitted and whether the arbitrators exceeded their authority. *See* ***Life of Am. Ins. Co. v. Aetna Life Ins. Co.***, 744 F.2d 409, 412-413 (5th Cir. 1984) (deferring decision on arbitrators' authority to award treble damages under Texas Insurance Code until after arbitration proceeding).

D. The Trial Court's judgment should be affirmed because the arbitrators exceeded their authority and awarded on a matter not submitted (Germane to Points of Error Nos. 10, 11 & 12):

The Court of Appeals incorrectly avoided the issue of whether the arbitrators exceeded the scope of their authority. *See* Op. at 6. Instead of addressing this alternative basis for affirming the Trial Court, the Court of Appeals observed that the Trial Court only modified the award, implying that the Trial Court's finding that the arbitrators exceeded their authority is irrelevant. In fact, this finding (which was not rejected by the Fourteenth Court) means that the Judgment should be affirmed. *See, e.g.*, ***Mid-Valley***, 347 F. Supp at 1108-10 (vacating punitive damages award as exceeding the scope of the arbitrator's authority).

As the Fourteenth Court correctly noted, Article 237 provides for vacating an award when the arbitrators exceed their authority. Article 238 provides for modification and correction when the arbitrators have awarded on a matter not submitted to them. *See* TEX. REV. CIV. STAT. ANN. art. 237 & 238. Nonetheless, there will be few, if any, cases where the arbitrators may award on a matter not submitted, yet still act within their authority. This is because all arbitration derives its authority from the parties' agreement. Consequently, there is a great deal of overlap between Articles 237 and 238 -- they are not mutually exclusive, as the Court of Appeals suggested.

The Texas courts may modify a part of an award if that portion is outside the arbitrators' authority. In ***Smith v. Barnett***, 373 S.W.2d 762, 765-66 (Tex. Civ. App.--Dallas 1963, no writ), the court modified an award to delete an incorrect amount of interest. The court viewed the mistake as not due to the arbitrators, yet held that even if the arbitrators exceeded their authority, the incorrect amount "could be disregarded as mere surplusage, and the remainder of the award left standing." ***Id.*** at 766. As in ***Smith***, the Fourteenth Court should have

affirmed the Trial Court's Judgment to delete the portion of the award which exceeded the arbitrators' authority. Hence, the Court of Appeals erred when it reversed the Trial Court's Judgment setting aside the punitive damages portion of the award.

E. The Fourteenth Court's Opinion incorrectly addressed the arbitrators' authority on *procedural* questions instead of reviewing the award pursuant to Articles 237 and 238 (Germane to Points of Error Nos. 12 & 13):

As noted, Articles 237 and 238 require the Texas courts to review arbitration awards if the review is timely requested. TEX. REV. CIV. STAT. ANN. arts. 237 & 238. Various grounds for review are specified in Articles 237 and 238. O'Quinn timely requested review of the award.

Despite the plain wording of Articles 237 and 238, the Fourteenth Court's Opinion essentially ignored the relevance of Kline's submissions to the arbitrators. *See* Op. at 8-10. In fact, Kline's demand for arbitration and other papers submitted to the arbitrators are the most important record of which issues were submitted to arbitration. *See* ***USX Corp v. West***, 781 S.W.2d 453 (Tex. App.--Houston [1st Dist.] 1989, no writ) (considering pleadings and submissions to arbitrators). As detailed below, Kline never submitted the question of punitive damages to arbitration. Under Article 238(A)(2), the Trial Court was therefore required to modify the award to delete the award of punitive damages.

In its opinion, the Court of Appeals cited ***USX, John Wiley & Sons, Inc. v. Livingston***, 376 U.S. 543 (1964), and ***Del E. Webb Constr. v. Richardson Hosp. Auth.***, 823 F.2d 145 (5th Cir. 1987), for the proposition that procedural questions involving a dispute in arbitration should be left to the arbitrators. The "procedural questions" at issued in ***John Wiley*** and ***Del Webb***, however, dealt only with the procedures the parties were required to follow prior to invoking arbitration. In ***John Wiley***, the Court considered an agreement that required (1) a conference among an employee, a union representative, and an officer of the employer and (2) a conference among an officer of the employer, the union shop committee and/or a union

representative *before* the parties initiated arbitration. 376 U.S. at 555-56. Similarly, ***Del Webb*** involved "contractual prerequisites for demanding arbitration," although the Fifth Circuit did not state just what these were. *See* 823 F.2d at 146 & 149-150.

In the arbitration clause at issue here, the parties were to "endeavor in good faith to resolve the dispute amicably" before resorting to arbitration. *See* Op. at 7. Whether or not they met this requirement would be a "procedural question" for the arbitrators under ***John Wiley*** and ***Del Webb***. However, that question is not at issue in this case. Instead of such a "procedural question," this case involves the scope of the arbitrators' authority and whether punitive damages were submitted to the arbitrators.

A close reading of ***USX*** shows that it actually supports O'Quinn's position. As detailed below, ***USX*** dealt primarily with the question of whether a trial court was required to *compel* arbitration after it had already stayed the case pending arbitration. *See* 781 S.W.2d at 454-56. In ***USX***, Energy Buyers filed suit, claiming both actual damages and punitive damages. ***Id.*** at 454 & 456. Unlike Kline, Energy Buyers clearly requested punitive damages. Moreover, Energy Buyers requested "damages" in its answer filed with the arbitrators. ***Id.*** at 455. With respect to the question of whether Energy Buyer's papers were sufficient or a clearer statement was required, the court observed that such matters were for the arbitrators. ***Id.*** at 456. The ***USX*** court did not consider the issue of the appropriate level of review by the courts <u>after</u> an award has been issued.

Unlike ***USX***, Kline's court pleadings failed to request punitive damages. Hence, there was no potential conflict between what Kline sought from the court versus what she sought from the arbitration, as was the case in ***USX***. Instead, Kline's submissions to the arbitrators made it quite clear that she was seeking actual damages, <u>not</u> punitive damages. Other courts have refused to allow arbitrators to award punitive

damages where such relief was not requested from the outset. *See* ***Hotel & Rest. Employees & Bartenders Int'l Union v. Michelson's Food Serv., Inc.***, 545 F.2d 1248, 1254 (9th Cir. 1976).

IV. Kline was not entitled to punitive damages (Germane to Points of Error Nos. 1 & 9):

This case illustrates a key problem with arbitration -- the arbitrators may, either inadvertently or intentionally, enter an award clearly contrary to the law, yet that award might be upheld. Even the Fourteenth Court held that O'Quinn owed no fiduciary duty to Kline. Op. at 17-18. Moreover, Justice Ellis clearly pointed out that O'Quinn owed no tort duty of good faith and fair dealing. Op. at 4-5. The only other claim submitted to arbitration was Kline's contract claim. As detailed below, Texas law clearly prohibits an award of punitive damages for mere breach of contract. But that is exactly the result of the Court of Appeals' Opinion.

A. Under Texas law, there are special rules applicable to punitive damages:

In addition to failing to plead and pray for exemplary damages and thus failing to submit the issue of punitive damages to the arbitrators, there is another important reason why Kline may not recover exemplary damages. Texas law simply does not allow the recovery of punitive damages for breach of contract, even if the breach is intentional, willful, and malicious. *See, e.g.,* ***Manges v. Guerra***, 673 S.W.2d 180, 184 (Tex. 1984); ***Amoco Prod. Co. v. Alexander***, 622 S.W.2d 563, 571 (Tex. 1981). Because plaintiffs continually attempt to side-step this rule by clever pleading, this Court has established the rule that a complainant's ability in Texas to recover exemplary damages in connection with a breach of contract claim is subject to special rules and requirements. The Court has held that in order to recover punitive damages attendant to a contract dispute a claimant must both (1) plead and (2) prove: (a) the commission of a separate tort, and (b) that the claimant

sustained separate actual damages as a result of that separate tort. See, e.g., ***International Bank, N.A. v. Morales***, 736 S.W.2d 622, 624 (Tex. 1987); ***Texas Nat'l Bank v. Karnes***, 717 S.W.2d 901, 903 (Tex. 1986); ***Jim Walter Homes, Inc. v. Reed***, 711 S.W.2d 617, 618 (Tex. 1986); ***Bellefonte Underwriter's Ins. Co. v. Brown***, 704 S.W.2d 742, 745 (Tex. 1986).

Simply alleging, as Kline did, that the defaulting party to a contract allegedly also breached some tort duty, *e.g.*, fiduciary duties or an implied duty of good faith and fair dealing, will not suffice. There must also be pleading and proof that the separate and distinct tortious conduct caused the claimant to sustain separate and distinct actual damages in tort. It is only the separate actual damages in tort that will support a claim for exemplary damages. *See, e.g.,* ***International Bank***, 736 S.W.2d at 624; ***Texas Nat'l Bank***, 717 S.W.2d at 903; ***Jim Walter Homes***, 711 S.W.2d at 618; ***Bellefonte Underwriter's Ins. Co.***, 704 S.W.2d at 745.

In a further attempt to side-step these requirements, plaintiffs frequently argue that their economic losses in fact are their required "tort" damages. This Court has rejected this argument. This Court has established the doctrine that if the actual damages sustained by the claimant are economic losses arising out of breach of the contract involved in the litigation, then no matter how the complainant disguises or characterizes her so-called tort claims, the dispute is simply one of breach of contract. *See, e.g.,* ***Crim Truck & Tractor Co. v. Navistar***, 823 S.W.2d 591, 594-95 (Tex. 1992); ***Southwestern Bell Telephone Co. v. FDP Corp.***, 811 S.W. 2d 572, 577 (Tex. 1991); ***Southwestern Bell Telephone Co. v. Delaney***, 809 S.W.2d 493, 495 (Tex. 1991); ***International Bank***, 736 S.W.2d at 624; ***Texas Nat'l Bank***, 717 S.W.2d at 903; ***Jim Walter Homes***, 711 S.W.2d at 618; ***Bellefonte Underwriter's Ins. Co.***, 704 S.W.2d at 745; and ***Amoco Prod. Co.***, 622 S.W.2d at 571.

In this case, there was no pleading of separate tortious conduct by O'Quinn that caused separate actual damages in tort to Kline. Kline alleged that she sustained economic losses

resulting from alleged breach of contract. Kline claimed she was entitled to monies owed to her under the contract, plus interest. The Award of actual damages made her whole. But then Kline presented the conclusory rhetoric commonly found in pleadings of this nature, the rhetoric which this Court has consistently held gives rise only to a claim for breach of contract. Kline made the conclusory allegations that O'Quinn breached an alleged duty of good faith and breach an alleged fiduciary duty. But, even if such allegations were true, which is denied, Kline did not plead and prove any separate actual damages in tort (*e.g.*, mental anguish, etc.) caused by the alleged tortious conduct. Thus, while these other extraneous allegations may sound bad (in fact, that is why plaintiffs usually add them into their petition when suing on a contract), they do not convert the case into a tort dispute and they will not support an award of punitive damages.[6]

Unfortunately, there is no transcript of the arbitration proceeding. Hence, this Court must rely on the pleadings and other submissions in order to determine what was submitted to the arbitrators. Although Kline suggested below that it is somehow O'Quinn's fault that there is no transcript, Kline also failed to seek a transcript. As detailed above, the Trial Court properly relied on Kline's submissions to the AAA to define her claims.

B. Kline also failed to plead and prove the type of intentional conduct necessary to support an award of punitive damages:

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[6] In most situations where a plaintiff is suing on a contract and is also attempting to recover exemplary damages, the plaintiff at least pleads that he or she is seeking exemplary damages. This at least gives the defendant fair notice of the plaintiff's intentions. But here Ms. Kline not only failed to plead and prove separate actual damages in tort to support an award of exemplary damages -- but did not even plead or pray for exemplary damages at all!

Assuming that Kline had actually pled and proved separate actual damages in tort sustained as a result of breach of an alleged duty of good faith and fair dealing and/or an alleged fiduciary duty, she still would not be entitled to punitive damages. A breach of the duty of good faith and fair dealing by itself does not entitle the injured party to punitive damages. A breach of a fiduciary duty by itself does not entitle the injured party to punitive damages. In order to recover exemplary damages for breach of the duty of good faith and fair dealing or breach of fiduciary duty, a complainant must also plead and prove and obtain the additional finding of fraud, malice, or gross negligence. *See* TEX. CIV. PRAC. & REM. CODE § 41.003 (Vernon Supp. 1993); ***Burk Royalty Co. v. Walls***, 616 S.W.2d 911, 922 (Tex. 1981) (addressing the issue of exemplary damages in general); ***Arnold v. Nat'l County Mutual Fire Ins. Co.***, 725 S.W.2d 165, 168 (Tex. 1987) (addressing the issue of exemplary damages in connection with claim of a breach of a duty of good faith and fair dealing); ***Manges v. Guerra***, 673 S.W.2d 180, 184 (Tex. 1984) (addressing the issue of exemplary damages in connection with a claim of breach of fiduciary duty). Because Kline did not plead or prove this additional element, she was never entitled to an award of exemplary damages for breach of the alleged torts of good faith and fair dealing and/or fiduciary duty. Hence, the Final Judgment should be affirmed.

V. Conclusions:

In this case, although the magnitude of the punitive damages was relatively small, Constitutional Due Process was violated by lack of notice. Moreover, none of the Constitutional safeguards required by the United States and Texas Supreme Courts with respect to the award of punitive damages, and the subsequent review of a punitive damages award, are found in an arbitration proceeding. For constitutional and public policy reasons, arbitrators should not be allowed to award punitive damages -- particularly in situations where the parties have not expressly authorized them to do so and thereby in effect waived their constitutional rights.

If this Court allows arbitrators in situations such as this to award punitive damages where the claimant did not seek punitive damages, and there was no notice that punitive damages might be in issue in the Arbitration Proceeding, and Texas law does not allow the award of punitive damages under the facts of this dispute, and there are no Constitutional safeguards, all legal principles and the Constitutional safeguards applicable to the award of punitive damages will be circumvented through the arbitration process.

This is a case in which the claimant did not properly lodge a claim for punitive damages. Kline's failure to request punitive damages in her pleadings demonstrates that the parties never intended to allow the arbitrators to award punitive damages. She sought only economic losses for breach of contract. It was only after the close of evidence that Kline's counsel (obviously believing he had successfully attacked O'Quinn) asked for such damages. Kline made this belated request even though Texas law does not allow the recovery of punitive damages under these circumstances. The Arbitrators, completely contrary to well-settled Texas law, nevertheless attempted to award such damages. This action by the Arbitrators exceeded their authority. The Trial Court was correct in vacating the portion of the Award where the Arbitrators exceeded their authority.

Contracting parties elect to submit their disputes to arbitration for the purpose of a private, speedy and fair resolution, without the delays and rigidities of a court trial. They expect the arbitration of their *contractual* disputes arising out of the contract. They do not expect the arbitrators to award punitive damages, particularly when the law does not allow the recovery of punitive damages for breach of contract.

It is one thing for contracting parties to submit to arbitration the issue of contractual compensatory damages, which are largely based on objective criteria. But punitive damages are entirely different. They are subjective and, as the New York Court of Appeals noted in ***Garrity***, take their shape

from attitudes towards correction and reform. Because the award of punitive damages is so subjective, supervision by the courts is required. The need for supervision is heightened in arbitration proceedings because of the abbreviated discovery in arbitration (which can function to deny the defendant from developing the facts necessary to refute the plaintiff's allegations), the fact that arbitrators historically do not adhere to the rules of evidence and are willing to listen to anything, no matter how irrelevant, emotional and prejudicial, and because of the extremely judicial review of arbitration awards.

Because one of the underlying theories of arbitration is that there should be minimal court review and supervision, allowing arbitrators to award punitive damages will lead to unpredictable, uncontrolled, and non-reviewable awards of punitive damages. This violates public policy concerns of the State and fails to comply with the requirements of the United States and Texas Constitutions. Should this Court conclude that policy and constitutional concerns do not require barring arbitrators completely from awarding punitive damages, those same concerns require that at the very least arbitrators may not award punitive damages except where the contracting parties have expressly granted them the authority to do so. Here the narrowly drawn contractual arbitration provision did not authorize the arbitrators to award punitive damages. The Trial Court's *Final Judgment* in this case eliminating the award of punitive damages against O'Quinn was entirely correct because the arbitrators were not authorized to award punitive damages.

O'Quinn respectfully urges that the Court grant a Writ of Error, reverse the decision of the Court of Appeals, and affirm the Trial Court's *Final Judgment*.

Respectfully submitted,

/s/ J. Clark Martin
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ATTORNEYS FOR PETITIONER
JOHN M. O'QUINN

CERTIFICATE OF SERVICE

I hereby certify that a copy of this *APPLICATION FOR WRIT OF ERROR OF PETITIONER JOHN M. O'QUINN* was served upon each of Donna C. Kline, Thomas J. Pearson, and Bank One, Texas, N.A., by mailing a copy of same via certified mail, return receipt requested, to their respective counsel of record as follows:

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Attorney for Bank One, Texas, N.A.

This 25th day of July, 1994.

/s/ J. Clark Martin

APPENDIX N

NO. 94-0780

JOHN M. O'QUINN,
Petitioner,

vs.

DONNA C. KLINE,
Respondent

IN THE TEXAS SUPREME COURT

MOTION FOR REHEARING ON APPLICATION
FOR WRIT OF ERROR OF PETITIONER
JOHN M. O'QUINN

TO THE SUPREME COURT OF TEXAS:

COMES NOW Petitioner John M. O'Quinn ("O'Quinn") and respectfully files this Motion for Rehearing of his Application for Writ of Error. For the reasons set forth below, O'Quinn prays that this Court grant this Motion and, upon rehearing, grant his Application for Writ and ***reverse*** the decision of the Court of Appeals and ***affirm*** the Final Judgment of the Trial Court.

For the reasons detailed in his Application for Writ of Error, which was filed on July 25, 1995, and is hereby incorporated fully by reference, Petitioner O'Quinn respectfully

requests rehearing on his Application for Writ of Error. The Points relied upon by O'Quinn are as follows:

1. This Court erred by not reversing the Court of Appeals' modification of the Final Judgment to include punitive damages from the arbitration award. (Op. at 6-12.)

2. This Court erred by not reversing the Court of Appeals' holding that certain aspects of O'Quinn's Constitutional arguments were waived. (Op. at 11.)

3. This Court erred by not reversing the Court of Appeals' holding that the arbitration award of punitive damages may be affirmed without violating the United States or Texas Constitutions. (Op. at 11.)

4. This Court erred by not reversing the Court of Appeals' holding that the arbitration award of punitive damages may be affirmed without violating the United States or Texas Constitutions because arbitration proceedings in general lack the necessary safeguards required by the United States and Texas Constitutions for arbitrators to award punitive damages, even if the parties attempt to specifically bestow that right upon the arbitrators. (Op. at 11.)

5. This Court erred by not reversing the Court of Appeals' holding that the arbitration award of punitive damages may be affirmed without violating the United States or Texas Constitutions because arbitration proceedings in general lack the necessary safeguards required by the United States and Texas Constitutions for arbitrators to award punitive damages and thus arbitrators may not award punitive damages unless the parties have clearly and expressly waived their Constitutional rights by authorizing the arbitrators to award punitive damages. (Op. at 11.)

6. This Court erred by not reversing the Court of Appeals' holding that the arbitration award of punitive damages

may be affirmed without violating the United States or Texas Constitutions because the arbitration proceedings as conducted denied O'Quinn Due Process of law. (Op. at 11.)

7. This Court erred in failing to adopt and apply as the public policy of Texas a rule that prohibits arbitrators from awarding punitive damages even when the parties attempt to grant the arbitrators the authority to award such relief. (Op. at 11-12.)

8. This Court erred in failing to adopt and apply as the public policy of Texas a rule that prohibits arbitrators from awarding punitive damages unless the parties have specifically and expressly agreed to give the arbitrators the authority to award such relief. (Op. at 11-12.)

9. This Court erred by not reversing the Court of Appeals' decision to reverse the Trial Court and then award punitive damages because there is no legal basis for an award of punitive damages in this case. (Op. 6-12 & 14-18.)

10. This Court erred by not reversing the Court of Appeals' conclusion that the parties contemplated the arbitration of tort claims and especially claims for punitive damages. (Op. 7-10.)

11. This Court erred by not reversing the Court of Appeals' conclusion that the award of punitive damages was within the scope of the arbitrator's authority. (Op. at 6-10.)

12. This Court erred by not reversing the Court of Appeals' conclusion that the arbitrators could have found that Kline's pleadings were sufficient to state a claim for punitive damages. (Op. at 8-10).

13. This Court erred by not reversing the Court of Appeals' presumption that the evidence before the arbitrators supported an award of punitive damages. (Op. at 10.)

14. This Court erred by not reversing the Court of Appeals' holding that, as the losing party in arbitration, Mr. O'Quinn was required to bring forward to the Trial Court a complete record and all bases for vacating or modifying the Arbitration Award. (Supp. Op. at 2.)

In conclusion, Mr. O'Quinn respectfully urges that the Court grant this Motion for Rehearing and, upon rehearing, grant the Application for a Writ of Error, reverse the decision of the Court of Appeals, and instead affirm the Trial Court's *Final Judgment*.

Respectfully submitted,

/s/ J. Clark Martin by Eva C. Ramos

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this MOTION FOR REHEARING ON APPLICATION FOR WRIT OF ERROR was served upon each of Donna C. Kline, Thomas J. Pearson, and Bank One, Texas, N.A., by mailing a copy of same via certified mail, return receipt requested, to their respective counsel of record as follows:

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Houston, Texas 77002

Attorney for Bank One, Texas, N.A.

This 16th day of December, 1994.

/s/ Eva C. Ramos

APPENDIX O

NO. 91-009787

Donna C. Kline	§	In the District Court of
	§	
VS.	§	Harris County, Texas
	§	
John M. O'Quinn and	§	
Thomas J. Pearson	§	280th Judicial District

O'QUINN'S OPPOSITION TO KLINE'S APPLICATION FOR DECREE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW John M. O'Quinn and respectfully files this his Opposition to Donna C. Kline's ("Kline") Application for Decree. In support thereof, John M. O'Quinn ("O'Quinn") respectfully shows the Court as follows:

INTRODUCTION:

1. Commencing on May 4, 1992 and continuing on various days through May 29, 1992, the Arbitration Proceeding No. 70 194 0030 91W was conducted before an Arbitration Panel. On June 23, 1992, the Arbitration Panel issued its *AWARD OF ARBITRATORS*. A severable portion of the *AWARD*, *i.e.*, Paragraph 2, exceeds the scope of the authority granted to the Arbitration Panel in the Agreement between O'Quinn, Kline and Pearson, grants relief not pled or prayed for or presented in the Arbitration Proceeding, and is contrary to the law. By his Motion to Vacate, or Alternatively, Modify and Correct Arbitration Award of September 21, 1992,

O'Quinn requested that this Court vacate the June 23, 1992 *AWARD OF ARBITRATORS* in its entirety or, alternatively, that this Court vacate Paragraph 2 of the *AWARD* and modify and correct the AWARD to award John M. O'Quinn twenty-five percent (25%) of all funds recovered by Thomas J. Pearson as attorneys fees in the *Goings v. City of Houston* litigation.

2. As detailed below, the award of exemplary damages was not authorized by the agreement among Kline, O'Quinn and Pearson; Kline did not seek punitive damages until her counsel requested such damages in a post-evidentiary brief and thus O'Quinn did not receive fair notice that Kline would seek an award of punitive damages from the arbitrators; Kline failed to comply with the requirements of Texas law that when a complainant seeks punitive damages in connection with a contract dispute, the complainant must plead and prove the existence of a separate tort which caused separate actual damages in tort; and Kline failed to comply with Texas law that in addition to pleading and proving a separate tort that caused separate actual damages, she must also pled and prove that the defendant's conduct in committing such tortious act constituted fraud, malice, or gross negligence.

3. If Kline agrees that the award of exemplary damages against O'Quinn was not authorized by the agreement among Kline, O'Quinn and Pearson; that Kline did not seek punitive damages until her counsel requested such damages in a post-evidentiary brief; that Kline did not plead and prove the existence of a separate tort which caused separate actual damages in tort; and that Kline failed to plead and prove O'Quinn conduct in committing such separate tortious act constituted fraud, malice, or gross negligence, then there is no dispute as to the material facts concerning the punitive damages portion of the *AWARD*. In such case, as a matter of

law, the *AWARD* should at the very least be partially vacated to strike Paragraph 2 thereof. But if Kline does not agree with these facts, then there exist genuine issues of material fact regarding the awarding of puniitve damages against O'Quinn, and the summary proceeding for a judgment requested by Kline is inappropriate. Consequently, O'Quinn respectfully requests that the Court deny Kline's Application for Decree.

PARAGRAPH 2 OF THE AWARD GRANTS RELIEF EXCEEDING THE ARBITRATORS' AUTHORITY AND WHICH WAS NOT PLED OR PRAYED FOR:

4. Arbitrators' conclusions regarding the scope of their authority and jurisdiction are subject to scrutiny by the courts to ensure that the arbitrators acted within the scope of their jurisdiction. *E.g., **E. I. Du Pont de Nemours & Co. v. Local 900***, 968 F.2d 456, 458 (5th Cir. 1992). Under the Texas General Arbitration Act, for example, this Court may vacate the entire *AWARD* or may correct or modify the *AWARD* because the Arbitration Panel exceeded the scope of its authority by awarding punitive damages. Tex. Rev. Civ. Stat. Ann. art. 237(A)(3) (vacating award) & art. 238(A)(2) (modifying or correcting award) (Vernon 1973).

5. Paragraph 2 of the *AWARD*, by which exemplary damages are awarded against O'Quinn in favor of Kline, exceeds the authority of the Arbitration Panel and grants relief not pled or prayed for. Exemplary damages may not be awarded by arbitrators where the parties have not specifically and expressly authorized the Arbitrators to do so. An award of exemplary damages was not authorized by the agreement among Kline, O'Quinn and Pearson. Paragraph 2 of the *AWARD* grants relief that was neither pled or prayed for and which was not submitted to this Arbitration Proceeding.

The award in Paragraph 2 exceeds the authority of the Arbitration Panel:

6. All arbitration proceedings in this State, whether conducted pursuant to the common law, the Texas General Arbitration Act, or the Federal Arbitration Act, arise out of consensual understandings. Article 224 of the Texas General Arbitration Act makes clear that a written agreement is required to compel parties to arbitrate their disputes and the terms of the written agreement govern which disputes are submitted to arbitration. Because arbitration provisions are in derogation of a right of trial by Jury, arbitration is not extended beyond the terms of the contract or to issues and matters not covered thereby. *See, e.g.,* ***Seale v. Roy M. Mitchell Contracting Co.***, 321 S.W.2d 149, 150 (Tex. Civ. App. -- Austin 1959, writ ref'd). Texas courts consistently hold that the parties must have *specifically agreed* to arbitrate the particular matter in dispute. *See, e.g.,* ***Valero Energy Corp. v. Wagner & Brown***, 777 S.W.2d 564, 566 (Tex. App. -- El Paso 1989, writ denied). The United States Supreme Court has admonished that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." ***United Steelworkers v. Warrior & Gulf Navigation Co.***, 363 U.S. 574, 582 (1960). An award in excess of the Arbitration Panel's authority is void. *See, e.g.,* ***Couey v. Arrow Coach Lines***, 288 S.W.2d 192, 196 (Tex. Civ. App. -- Austin 1956, no writ).

7. The dispute submitted to the Arbitration Panel arises out on a written agreement entered into among Kline, O'Quinn and Pearson relating to the apportionment of legal fees received from several cases. In such agreement, there was an arbitration provision which provides as follows:

> *. . . . In the event that a dispute arises among Parties that cannot be amicably resolved or, Parties have elected to terminate this Agreement and are unable to reach an agreement to that end, said dispute shall be determined by arbitration conducted in the City of Houston, State of Texas, in accordance with the rules then in force of the American Arbitration Association.*

By this agreement, O'Quinn, Kline and Pearson did not expressly, or even by implication, grant authority to the Arbitrators to award exemplary damages in connection with disputes arising out of an alleged breach of the contract in dispute. Moreover, the arbitration provision agreed to by the parties did not include the terminology frequently found in arbitration provisions that the parties submit to arbitration any and all claims, demands, disputes, controversies, or other matters pertaining to the written agreement in issue, whether or not arising independently of the written agreement, and whether in contract, tort or otherwise. Absent such broad terminology, there was no authority in the written arbitration provision, which was written in the context of resolving contractual disputes, for the Arbitration Panel to award exemplary damages for alleged activities outside the scope of the contract.

8. Some states have specifically held that punitive damages may not be awarded at all by arbitrators, even if the parties authorized the arbitrators to award punitive damages. Some States have concluded that in view of the limited right of judicial review afforded in an arbitration proceeding, allowing arbitrators to award punitive damages would lead to consequences that are both unpredictable and uncontrollable. In ***Garrity v. Lyle Stuart, Inc.***, 40 N.Y.2d 354, 386 N.Y.S. 2d 831, 353 N.E.2d 793 (N.Y. 1976), for example, the New York Court

of Appeals held that the award of punitive damages requires judicial oversight and thus is beyond the province of arbitration proceedings. It is respectfully submitted that the same public policy considerations that caused the highest court in New York to conclude that punitive damages may not be awarded in an arbitration proceeding are also applicable in Texas. While the issue is far from settled in Texas, *see, e.g.,* ***Lone Star Cotton Mills v. Thomas***, 227 S.W.2d 300, 307 (Tex. Civ. App. -- El Paso 1949, writ ref'd n.r.e.) (holding that arbitrators must be granted authority to award even actual damages), one Texas Court of Appeals has held that the arbitrators have the power to award punitive damages -- where the parties have ***expressly*** submitted the issue to the arbitrators. ***Grissom v. Greener & Sumner Constr., Inc.***, 676 S.W.2d 709, 711 (Tex. App. -- El Paso 1984, writ ref'd). But the ***Grissom*** decision is not applicable here because the parties here did not expressly submit the issue to the arbitrators. It is respectfully that, as a matter of law, arbitrators should not be allowed to award punitive damages unless the parties have specifically and expressly granted that authority to the arbitrators.

Kline's pleadings and presentation did not provide fair notice that she was seeking punitive damages:

9. Due process of law also applies in arbitration proceedings just as in other legal proceedings. This means that parties are entitled to fair notice of the claims made against them. In her Plaintiff's Original Petition, a copy of which is attached to Michael O'Brien's Affidavit, Kline alleged breach of contract, breach of an alleged tort duty of good faith, and breach of an alleged fiduciary duty. Kline pled and prayed only for actual damages. Kline did not plead or pray for exemplary damages. Indeed, there is no mention -- not one single word -- in her Petition about exemplary damages. As the Affidavit

of O'Quinn's lead counsel during the Arbitration Proceeding shows, Kline did not request punitive damages in any demand or claim filed with the AAA, she did not present any testimony regarding punitive damages during the proceeding, nor did she argue any claim for punitive damages during closing argument. *See* Affidavit of Michael O'Brien, which is attached hereto as Exhibit 1.

10. Under Texas law, a pleading must provide the opponent fair notice of the claims in issue. *See, e.g.,* ***Stone v. Lawyers Title Ins. Corp.***, 554 S.W.2d 183 (Tex. 1977). The object and purpose of a pleading is to give fair and adequate notice to the party being sued of the nature of the cause of action asserted against him so he may adequately prepare his defense. *See* ***Castleberry v. Goolsby Bldg. Corp.***, 617 S.W.2d 665, 666 (Tex. 1981) (holding that claims of negligence and gross negligence are not sufficient to provide fair notice that the claimant's cause of action was actually intended to be for intentional injury).

11. Rule 56 of the Texas Rules of Civil Procedure provides that special damages must be specifically pled. Special damages are those that result from the defendant's alleged wrongful conduct but are of such an unusual nature that they normally vary with the circumstances of the individual case in which they occur. *See* ***Sherrod v. Bailey***, 580 S.W.2d 24, 28 (Tex. Civ. App. -- Houston [1st Dist.] 1970, writ ref'd n.r.e.). Exemplary damages are in the nature of special damages. In order to recover exemplary damages, there must be a specific claim for such damages or the allegations with respect to the alleged wrong must be pled in such detail as to comply with the fair notice requirements of Texas law. For example, in ***Nipper v. U-Haul Company of San Antonio***, 516 S.W.2d 467 (Tex. Civ. App. -- Beaumont 1974, no writ), the Court of Appeals exam-

ined a pleading in which the plaintiff alleged in conclusory fashion that the defendant owed her a contractual debt, that the amount of the debt "constituted trust funds of the Plaintiff in the hands of the Defendant," and that the defendant "willfully, maliciously, and fraudulently converted such funds to his own use" -- allegations which are strikingly similar to Kline's allegations. The Court of Appeals held that as a matter of law such pleadings were insufficient to support an award of exemplary damages. *Id.* at 470.

Under Texas law, there exist unique rules applicable to efforts of plaintiffs to recover punitive damages in connection with contract disputes:

12. In addition to failing completely to plead and pray for exemplary damages and thus failing to give fair notice to O'Quinn that she might somehow attempt to obtain punitive damages in this proceeding, there is another, perhaps even more absolute, reason why Kline as a matter of law may not be awarded exemplary damages. Texas law simply does not allow the recovery of punitive damages for breach of contract, even if the breach is intentional, willful, and malicious. *See, e.g., Manges v. Guerra*, 673 S.W.2d 184 (Tex. 1984); ***Amoco Prod. Co. v. Alexander***, 622 S.W.2d 563, 571 (Tex. 1981). Because parties continually attempt to side-step this rule by clever pleading, the Texas Supreme Court has established the rule that a complainant's ability in Texas to recover exemplary damages in connection with a breach of contract claim is subject to special rules and requirements. The Texas Supreme Court has held that in order to recover punitive damages attendant to a contract dispute a claimant must both (1) plead and (2) prove: (a) the commission of a separate tort, and (b) **that the claimant sustained separate actual damages as a result of that separate tort**. See, e.g., ***International Bank, N.A. v. Morales***, 736 S.W.2d

622, 624 (Tex. 1987); ***Texas Nat'l Bank v. Karnes***, 717 S.W.2d 901, 903 (Tex. 1986); ***Jim Walter Homes, Inc. v. Reed***, 711 S.W.2d 617, 618 (Tex. 1986); ***Bellefonte Underwriter's Ins. Co. v. Brown***, 704 S.W.2d 742, 745 (Tex. 1986).

13. Simply alleging, as Kline did, that the defaulting party to a contract allegedly also breached some tort duty, *e.g.*, fiduciary duties or an implied duty of good faith and fair dealing, will not suffice. There must also be pleading and proof that the separate and distinct tortious conduct caused the claimant to sustain separate and distinct actual damages in tort. It is only the separate actual damages in tort that will support a claim for exemplary damages! *See, e.g.*, ***International Bank***, 736 S.W.2d at 624; ***Texas Nat'l Bank***, 717 S.W.2d at 903; ***Jim Walter Homes***, 711 S.W.2d at 618; ***Bellefonte Underwriter's Ins. Co.***, 704 S.W.2d at 745.

14. In a further attempt to side-step these requirements, plaintiffs frequently argue that their economic losses in fact are their required "tort" damages. The Texas Supreme Court has rejected this argument. The Court has established the doctrine that if the actual damages sustained by the claimant are economic losses arising out of breach of the contract involved in the litigation, then no matter how the complainant disguises or characterizes her so-called tort claims, the dispute is simply one of breach of contract. *See, e.g.*, ***International Bank***, 736 S.W.2d at 624; ***Texas Nat'l Bank***, 717 S.W.2d at 903; ***Jim Walter Homes***, 711 S.W.2d at 618; ***Bellefonte Underwriter's Ins. Co.***, 704 S.W.2d at 745; and ***Amoco Prod. Co.***, 622 S.W.2d at 571. *See also* ***Crim Truck & Tractor Co. v. Navistar***, 823 S.W.2d 591, 594-95 (Tex. 1992); ***Southwestern Bell Telephone Co. v. FDP Corp.***, 811 S.W. 2d 572, 577 (Tex. 1991); ***Southwestern Bell Telephone Co. v. Delaney***, 809 S.W.2d 493, 495 (Tex. 1991).

15. In this case, there is no pleading of separate tortious conduct by O'Quinn that caused separate actual damages in tort to Kline. Kline alleged that she sustained economic losses resulting from alleged breach of contract. Kline claimed she was entitled to monies owed to her under the contract, plus interest. This Arbitration Panel's award in favor of Kline under Paragraph 1 of the *AWARD OF ARBITRATORS* makes her whole for this damage, *i.e.*, Kline recovers what this Arbitration Panel concluded she was owed under the agreement plus interest. But then Kline presented the conclusory allegations commonly found in pleadings of this nature, the allegations which the Texas Supreme Court has consistently held gives rise only to a claim for breach of contract. Kline made only the conclusory allegations that O'Quinn breached an alleged duty of good faith and breach an alleged fiduciary duty. But, even if such allegations were true, which is denied, Kline did not plead and prove any separate actual damages in tort (*e.g.*, mental anguish, etc.) caused by the alleged tortious conduct. Thus, these types of allegations do not convert the case into a tort dispute and they will not support an award of punitive damages.

16. If Kline had actually pled and proved separate actual damages in tort sustained as a result of breach of an alleged duty of good faith and fair dealing and/or an alleged fiduciary duty, this would justify the award of actual damages in tort -- but not punitive damages. A breach of the duty of good faith and fair dealing by itself does not entitle the injured party to punitive damages. A breach of a fiduciary duty by itself does not entitle the injured party to punitive damages. In order to recover exemplary damages for breach of the duty of good faith and fair dealing or breach of fiduciary duty, a complainant must also plead and prove and obtain the additional finding of fraud, malice, or gross negligence. *See Tex. Civ.*

Prac. and Rem. Code §41.003; ***Burk Royalty Co. v. Walls***, 616 S.W.2d 911, 922 (Tex. 1981) (addressing the issue of exemplary damages in general); ***Arnold v. Nat. County Mutual Fire Ins. Co.***, 725 S.W.2d 165, 168 (Tex. 1987) (addressing the issue of exemplary damages in connection with claim of a breach of a duty of good faith and fair dealing); ***Manges v. Guerra***, 673 S.W.2d 180, 184 (Tex. 1984) (addressing the issue of exemplary damages in connection with a claim of breach of fiduciary duty). Here, Kline did not plead or prove this additional element which is necessary to support an award of exemplary damages for breach of the alleged torts of good faith and fair dealing and/or fiduciary duty.

Conclusion:

17. In this case there was no pleading or prayer -- no notice whatsoever -- that Kline was thinking of asking for punitive damages. Kline did not plead the existence of a separate and distinct tort that caused separate actual damages in tort. Kline did not plead that O'Quinn had committed a separate and distinct tort in a manner that constituted fraud, malice or gross negligence. Each of these elements is required by Texas law before a claimant can recover punitive damages. Arbitration proceedings are certainly less structured than trials by Jury, but basic notions of fairness and due process still apply -- and awarding punitive damages under these circumstances violates both.

18. As described in Mr. O'Brien's Affidavit, O'Quinn never received fair notice of any request for punitive damages. Accordingly, the summary request for a "Decree" by Kline should be denied. Kline's "Application for Decree" is more in the nature of a motion for summary judgment. Because there are genuine issues of material fact about whether

O'Quinn received fair notice that Kline would request punitive damages, O'Quinn respectfully requests that this Court Deny Kline's request for such summary relief.

WHEREFORE, PREMISES CONSIDERED, John M. O'Quinn respectfully requests that this Court DENY Kline's Application for Decree and instead vacate the June 23, 1992 *AWARD OF ARBITRATORS* in its entirety or, alternatively, (i) vacate Paragraph 2 of the *AWARD, and* (ii) modify and correct the AWARD to award John M. O'Quinn twenty-five (25%) of all funds recovered by Thomas J. Pearson as attorneys fees in the *Goings v. City of Houston* litigation.

Respectfully submitted,

/s/ J. Clark Martin
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ATTORNEYS FOR
JOHN M. O'QUINN

CERTIFICATE OF SERVICE

I hereby certify that a copy of this O'QUINN'S OPPOSITION TO KLINE'S APPLICATION FOR DECREE was served upon each of Donna C. Kline and Thomas J. Pearson by hand delivering copies to their respective counsel of record as follows:

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12 Greenway Plaza,
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Attorney for
Donna C. Kline

Thomas J. Pearson & Associates
6100 Hillcroft, Suite 500
Houston, Texas 77081-1006

Pro se

This 1st day of October, 1992.

/s/ J. Clark Martin
J. Clark Martin

APPENDIX P

NO. 91-009787

Donna C. Kline	§	In the District Court of
	§	
VS.	§	Harris County, Texas
	§	
John M. O'Quinn and	§	
Thomas J. Pearson	§	280th Judicial District

O'QUINN'S MOTION TO VACATE, OR, ALTERNATIVELY, MODIFY AND CORRECT ARBITRATION AWARD

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW John M. O'Quinn and respectfully files this his Motion to Vacate, or, Alternatively, to Modify and Correct the June 23, 1992 Arbitration Award entered by an Arbitration Panel in connection with this Cause. In support thereof, John M. O'Quinn ("O'Quinn") respectfully shows the Court as follows:

INTRODUCTION:

1. Commencing on May 4, 1992 and continuing on various days through May 29, 1992, the Arbitration Proceeding No. 70 194 0030 91W was conducted before an Arbitration Panel. On June 23, 1992, the Arbitration Panel issued its *AWARD OF ARBITRATORS*, which was received by O'Quinn on June 24, 1992. Review of the *AWARD* revealed that a severable portion of the *AWARD*, *i.e.*, Paragraph 2, exceeds the scope of the authority granted to the Arbitration Panel in the

Agreement between O'Quinn, Kline and Pearson, grants relief not pled or prayed for or presented in the Arbitration Proceeding, and is contrary to the law. Review of the *AWARD* also revealed that the *AWARD* did not address an uncontroverted issue and thus there is an evident miscalculation and mistake in the description of the award to O'Quinn of monies due and owing to him by Thomas J. Pearson.

2. O'Quinn then retained undersigned counsel, who did not represent him in the Arbitration Proceedings, to review the *AWARD OF ARBITRATORS* and determine whether it was proper. Undersigned counsel for O'Quinn reviewed the AWARD and requested that the American Arbitration Association allow review of the files on the Arbitration Proceeding. The AAA refused to allow O'Quinn's counsel access to the AAA files. Undersigned counsel nevertheless prepared and presented to the AAA a Motion on behalf of O'Quinn requesting that the AWARD be partially modified or vacated. The AAA then took the position that, irrespective of the provisions of the Texas General Arbitration Act, an AAA Award may not be be modified or vacated -- indeed that a motion to modify or vacate may not even be considered by the Arbitrators -- unless all parties agree to the reinstatement of the Arbitrators. The AAA took the position that because Kline had stated she would not agree to the reinstatement of the Arbitrators, the AAA would not even present O'Quinn's Motion to the Arbitrators. That position by the AAA was incorrect. The American Arbitration Association's own Guide to Commercial Arbitration provides that an award may be modified if the parties if the law so provides. It was only after undersigned counsel requested that the issue be decided by the AAA's head office in New York that the AAA admitted its position was in error. However, the AAA and the Arbitration

Panel subsequently declined to partially modify and vacate the AWARD as required by law.

3. This Motion is timely filed pursuant to Articles 232, 237 and 238 of the Texas General Arbitration Act, and, to the extent applicable, common law arbitration principles. By this Motion, O'Quinn respectfully requests that this Court vacate the June 23, 1992 *AWARD OF ARBITRATORS* in its entirety or, alternatively, that this Court vacate Paragraph 2 of the *AWARD* and modify and correct the AWARD to award John M. O'Quinn twenty-five (25%) of all funds recovered by Thomas J. Pearson as attorneys fees in the *Goings v. City of Houston* litigation.

PARAGRAPH 2 OF THE AWARD EXCEEDS THE AUTHORITY OF THE ARBITRATION PANEL, GRANTS RELIEF NOT PLED OR PRAYED FOR OR SUBMITTED TO THE ARBITRATION PANEL, AND IS CONTRARY TO THE LAW:

4. Although it is often assumed that an arbitration award is entitled to great deference by the Courts, this is simply not the law. In fact, arbitrators' conclusions regarding the scope of their authority and jurisdiction are subject to scrutiny by the courts to ensure that the arbitrators acted within the scope of their jurisdiction. *E.g., **E. I. Du Pont de Nemours & Co. v. Local 900***, 968 F.2d 456, 458 (5th Cir. 1992). Under the Texas General Arbitration Act, for example, the Court may vacate the entire AWARD or may correct or modify the AWARD because the Arbitration Panel exceeded the scope of its authority by awarding punitive damages. Tex. Rev. Civ. Stat. Ann. art. 237(A)(3) (vacating award) & art. 238(A)(2) (modifying or correcting award) (Vernon 1973).

5. Paragraph 2 of the *AWARD*, by which exemplary damages are awarded against O'Quinn in favor of Kline, exceeds the authority of the Arbitration Panel, grants relief not pled or prayed for or submitted to the Arbitration Panel, and is contrary to the law for four interwoven reasons. First, an award of exemplary damages was not authorized by the agreement among Kline, O'Quinn and Pearson. Exemplary damages may not be awarded by arbitrators unless the parties have specifically and expressly authorized the Arbitrators to do so. Second, Paragraph 2 grants relief that was neither pled or prayed for and which was not submitted to this arbitration proceeding. Third, Kline failed to comply with the requirements of Texas law that when a complainant seeks punitive damages in connection with a contract dispute, the complainant must plead and prove the existence of a separate tort which caused separate actual damages in tort. It is only such separate actual damages in tort which can legally support the requested exemplary damages. Fourth, Kline failed to comply with Texas law that in addition to pleading and proving a separate tort that caused separate actual damages, she must also pled and prove that the defendant's conduct in committing such tortious act constituted fraud, malice, or gross negligence.

The award in Paragraph 2 exceeds the authority of the Arbitration Panel:

6. All arbitration proceedings in this State, whether conducted pursuant to the common law, the Texas General Arbitration Act, or the Federal Arbitration Act, arise out of consensual understandings. Article 224 of the Texas General Arbitration Act makes clear that a written agreement is required to compel parties to arbitrate their disputes and the terms of the written agreement govern which disputes are submitted to arbitration. Because arbitration provisions are in

derogation of a right of trial by Jury, arbitration is not extended beyond the terms of the contract or to issues and matters not covered thereby. *See, e.g.,* ***Seale v. Roy M. Mitchell Contracting Co.***, 321 S.W.2d 149, 150 (Tex. Civ. App. -- Austin 1959, writ ref'd). Texas courts consistently hold that the parties must have *specifically agreed* to arbitrate the particular matter in dispute. *See, e.g.,* ***Valero Energy Corp. v. Wagner & Brown***, 777 S.W.2d 564, 566 (Tex. App. -- El Paso 1989, writ denied). The United States Supreme Court has admonished that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." ***United Steelworkers v. Warrior & Gulf Navigation Co.***, 363 U.S. 574, 582 (1960). An award in excess of the Arbitration Panel's authority is void. *See, e.g.,* ***Couey v. Arrow Coach Lines***, 288 S.W.2d 192, 196 (Tex. Civ. App. -- Austin 1956, no writ).

7. The dispute submitted to this Arbitration Panel arises out on a written agreement entered into among Kline, O'Quinn and Pearson relating to the apportionment of legal fees received from several cases. In such agreement, there was an arbitration provision which provides as follows:

> *. . . . In the event that a dispute arises among Parties that cannot be amicably resolved or, Parties have elected to terminate this Agreement and are unable to reach an agreement to that end, said dispute shall be determined by arbitration conducted in the City of Houston, State of Texas, in accordance with the rules then in force of the American Arbitration Association.*

By this agreement, O'Quinn, Kline and Pearson did not expressly, or even by implication, grant authority to the Arbitra-

tors to award exemplary damages in connection with disputes arising out of an alleged breach of the contract in dispute. Moreover, the arbitration provision agreed to by the parties did not include the terminology frequently found in arbitration provisions that the parties submit to arbitration any and all claims, demands, disputes, controversies, or other matters pertaining to the written agreement in issue, whether or not arising independently of the written agreement, and whether in contract, tort or otherwise. Absent such broad terminology, there was no authority in the written arbitration provision, which was written in the context of resolving contractual disputes, for the Arbitration Panel to award exemplary damages for alleged activities outside the scope of the contract.

8. In this case, as will be discussed below, the only alleged activities that could have possibly given rise to punitive damages would have been activities outside the agreement. This is because Texas law does not allow the recovery of exemplary damages for breach of contract. Additionally, because of the unique and harsh nature of punitive damages, it is inappropriate to simply assume that the parties intended this arbitration provision to authorize the arbitrators to award punitive damages for outside-the-contract activities. This judicial philosophy is reflected in ***Decision Controls Systems, Inc. v. Personnel Cost Control, Inc.***, 787 S.W.2d 98 (Tex. App. -- Dallas 1990, no writ), wherein the Dallas Court of Appeals held that an arbitration provision which did not clearly specify that the parties would arbitrate DTPA claims arising independently of the contract was not specific enough to include such claims. The arbitration provision in the contract among Kline, O'Quinn and Pearson certainly did not specifically authorize the Arbitration Panel to award punitive damages for activities for which punitive damages may not be awarded under Texas law, *i.e.*, for breach of contract. And similar to ***Decision Con-***

trols Systems, the arbitration provision did not specifically authorize the Arbitration Panel to award punitive damages for outside-the-contract activities. As such, it is respectfully urged that this Arbitration Panel exceeded its authority in awarding punitive damages.

9. Some states have specifically held that punitive damages may not be awarded by arbitrators, even if the parties authorized the arbitrators to award punitive damages. Some States have concluded that in view of the limited right of judicial review afforded in an arbitration proceeding, allowing arbitrators to award punitive damages would lead to consequences that are both unpredictable and uncontrollable. In ***Garrity v. Lyle Stuart, Inc.***, 40 N.Y.2d 354, 386 N.Y.S. 2d 831, 353 N.E.2d 793 (N.Y. 1976), for example, the New York Court of Appeals held that the award of punitive damages requires judicial oversight and thus is beyond the province of arbitration proceedings. It is respectfully submitted that the same public policy considerations that caused the highest court in New York to conclude that punitive damages may not be awarded in an arbitration proceeding are also applicable in Texas. While the issue is far from settled in Texas, *see, e.g.*, ***Lone Star Cooten Mills v. Thomas***, 227 S.W.2d 300, 307 (Tex. Civ. App. -- El Paso 1949, writ ref'd n.r.e.) (holding that arbitrators must be granted authority to award even actual damages), one Texas Court of Appeals has held that the arbitrators have the power to award punitive damages -- where the parties have ***expressly*** submitted the issue to the arbitrators. ***Grissom v. Greener & Sumner Constr., Inc.***, 676 S.W.2d 709, 711 (Tex. App. -- El Paso 1984, writ ref'd). But the ***Grissom*** decision is not applicable here because the parties here did not expressly submit the issue to the arbitrators. It is respectfully that, as a matter of law, arbitrators should not be allowed to award punitive damages

unless the parties have specifically and expressly granted that authority to the arbitrators.

The relief granted in Paragraph 2 was not pled or prayed for, and was not submitted to the Arbitration Panel:

10. Due process of law applies in arbitration proceedings just as in other legal proceedings. This means that parties are entitled to fair notice of the claims made against them. Assuming that O'Quinn, Kline and Pearson had intended for the arbitration clause in their contract to extend to extra-contractual activities and had specifically and expressly authorized the Arbitration Panel to hear and decide such matters and to award both actual and punitive damages in connection with such activities, this is not a case in which Kline pled or prayed for punitive damages from O'Quinn.

11. Under Texas law, a pleading must provide the opponent fair notice of the claims in issue. *See, e.g., **Stone v. Lawyers Title Ins. Corp.***, 554 S.W.2d 183 (Tex. 1977). The object and purpose of a pleading is to give fair and adequate notice to the party being sued of the nature of the cause of action asserted against him so he may adequately prepare his defense. *See **Castleberry v. Goolsby Bldg. Corp.***, 617 S.W.2d 665, 666 (Tex. 1981) (holding that claims of negligence and gross negligence are not sufficient to provide fair notice that the claimant's cause of action was actually intended to be for intentional injury). The claim that Kline presented to the Arbitration Panel in this Proceeding is defined by her *PLAINTIFF'S ORIGINAL PETITION* filed in State court. By letter of May 28, 1991 from Mr. Norman Riedmueller to Ms. Tamme S. Wilkes of the American Arbitration Association, Mr. Riedmueller transmitted such pleading to the American Arbi-

tration Association as the definition of Kline's claim. In her Petition, Kline alleged breach of contract, breach of an alleged tort duty of good faith, and breach of an alleged fiduciary duty. Kline pled and prayed only for actual damages. Kline did not plead or pray for exemplary damages. Indeed, there is no mention -- not one single word -- in her Petition about exemplary damages. *See PLAINTIFF'S ORIGINAL PETITION.*

12. Rule 56 of the Texas Rules of Civil Procedure provides that special damages must be specifically pled. Special damages are those that result from the defendant's alleged wrongful conduct but are of such an unusual nature that they normally vary with the circumstances of the individual case in which they occur. *See* ***Sherrod v. Bailey***, 580 S.W.2d 24, 28 (Tex. Civ. App. -- Houston [1st Dist.] 1970, writ ref'd n.r.e.). Rule 56 recognizes that special damages are completely unlike general damages, the latter being so usual an accompaniment of the kind of wrongdoing alleged in the pleading that the mere allegation of the wrong gives the opposing party fair notice. Exemplary damages are in the nature of special damages. Exemplary damages are allowed only as a result of the defendant's wrongful conduct and such damages vary with the circumstances of the individual case in which they occur and with the conduct of the individual defendants involved in the case. In order to recover exemplary damages, there must be a specific claim for such damages or the allegations with respect to the alleged wrong must be pled in such detail as to comply with the fair notice requirements of Texas law. For example, in ***Nipper v. U-Haul Company of San Antonio***, 516 S.W.2d 467 (Tex. Civ. App. -- Beaumont 1974, no writ), the Court of Appeals examined a pleading in which the plaintiff alleged in conclusory fashion that the defendant owed her a contractual debt, that the amount of the debt "constituted trust funds of the Plaintiff in the hands of the Defendant," and that the

defendant "willfully, maliciously, and fraudulently converted such funds to his own use" -- allegations which are strikingly similar to Kline's allegations. The Court of Appeals held that as a matter of law such pleadings were insufficient to support an award of exemplary damages. *Id.* at 470.

13. In this case there was no pleading or prayer -- no notice whatsoever -- that Kline was thinking of asking for punitive damages. As will be discussed in the following sections of this Motion, Kline did not plead the existence of a separate and distinct tort that caused separate actual damages in tort. Kline did not plead that O'Quinn had committed a separate and distinct tort in a manner that constituted fraud, malice or gross negligence. Each of these elements is required by Texas law before a claimant can recover punitive damages. Lawyers who are trained to recognize the necessary elements of a claim for punitive damages simply could not have known from Kline's pleadings that she was thinking about attempting to recover punitive damages. The law does not require them to guess as what Kline might be secretly planning. Although undersigned counsel was not in attendance when this case was presented to the Arbitration Panel, it is my understanding that O'Quinn and his trial counsel did not know that Kline was pleading to seek exemplary damages until after the evidentiary portion of the proceeding had been closed. It is my understanding that it was only then, with no pleading to support the claim and with the issue not having previously been presented, that Kline asked for punitive damages. Arbitration proceedings are certainly less structured than trials by Jury, but basic notions of fairness and due process still apply -- and awarding punitive damages under these circumstances violates both.

Under Texas law, there exist unique rules applicable to efforts of plaintiffs to recover punitive damages in connection with contract disputes:

14. In addition to failing completely to plead and pray for exemplary damages and thus failing to give fair notice to O'Quinn that she might somehow attempt to obtain punitive damages in this proceeding, there is another, perhaps even more absolute, reason why Kline as a matter of law may not be awarded exemplary damages. Texas law simply does not allow the recovery of punitive damages for breach of contract, even if the breach is intentional, willful, and malicious. *See, e.g.*, ***Manges v. Guerra***, 673 S.W.2d 184 (Tex. 1984); ***Amoco Prod. Co. v. Alexander***, 622 S.W.2d 563, 571 (Tex. 1981). Because plaintiffs continually attempt to side-step this rule by clever pleading, the Texas Supreme Court has established the rule that a complainant's ability in Texas to recover exemplary damages in connection with a breach of contract claim is subject to special rules and requirements. The Texas Supreme Court has held that in order to recover punitive damages attendant to a contract dispute a claimant must both (1) plead and (2) prove: (a) the commission of a separate tort, and (b) **that the claimant sustained separate actual damages as a result of that separate tort**. See, e.g., ***International Bank, N.A. v. Morales***, 736 S.W.2d 622, 624 (Tex. 1987); ***Texas Nat'l Bank v. Karnes***, 717 S.W.2d 901, 903 (Tex. 1986); ***Jim Walter Homes, Inc. v. Reed***, 711 S.W.2d 617, 618 (Tex. 1986); ***Bellefonte Underwriter's Ins. Co. v. Brown***, 704 S.W.2d 742, 745 (Tex. 1986).

15. Simply alleging, as Kline did, that the defaulting party to a contract allegedly also breached some tort duty, *e.g.*, fiduciary duties or an implied duty of good faith and fair dealing, will not suffice. There must also be pleading and proof that the separate and distinct tortious conduct caused the

claimant to sustain separate and distinct actual damages in tort. It is only the separate actual damages in tort that will support a claim for exemplary damages! *See, e.g.,* ***International Bank***, 736 S.W.2d at 624; ***Texas Nat'l Bank***, 717 S.W.2d at 903; ***Jim Walter Homes***, 711 S.W.2d at 618; ***Bellefonte Underwriter's Ins. Co.***, 704 S.W.2d at 745.

16. In a further attempt to side-step these requirements, plaintiffs frequently argue that their economic losses in fact are their required "tort" damages. The Texas Supreme Court has rejected this argument. The Court has established the doctrine that if the actual damages sustained by the claimant are economic losses arising out of breach of the contract involved in the litigation, then no matter how the complainant disguises or characterizes her so-called tort claims, the dispute is simply one of breach of contract. *See, e.g.,* ***Crim Truck & Tractor Co. v. Navistar***, 823 S.W.2d 591, 594-95 (Tex. 1992); ***Southwestern Bell Telephone Co. v. FDP Corp.***, 811 S.W. 2d 572, 577 (Tex. 1991); ***Southwestern Bell Telephone Co. v. Delaney***, 809 S.W.2d 493, 495 (Tex. 1991); ***International Bank***, 736 S.W.2d at 624; ***Texas Nat'l Bank***, 717 S.W.2d at 903; ***Jim Walter Homes***, 711 S.W.2d at 618; ***Bellefonte Underwriter's Ins. Co.***, 704 S.W.2d at 745; and ***Amoco Prod. Co.***, 622 S.W.2d at 571.

17. In this case, there is no pleading of separate tortious conduct by O'Quinn that caused separate actual damages in tort to Kline. Kline alleged that she sustained economic losses resulting from alleged breach of contract. Kline claimed she was entitled to monies owed to her under the contract, plus interest. This Arbitration Panel's award in favor of Kline under Paragraph 1 of the *AWARD* makes her whole for this damage, *i.e.*, Kline recovers what this Arbitration Panel concluded she was owed under the agreement plus

interest. But then Kline presented the conclusory rhetoric commonly found in pleadings of this nature, the rhetoric which the Texas Supreme Court has consistently held gives rise only to a claim for breach of contract. Kline made the conclusory allegations that O'Quinn breached an alleged duty of good faith and breach an alleged fiduciary duty. But, even if such allegations were true, which is denied, Kline did not plead and prove any separate actual damages in tort (*e.g.*, mental anguish, etc.) caused by the alleged tortious conduct. Thus, while these other extraneous allegations may sound bad (in fact, that is why plaintiffs usually add them into their petition when suing on a contract), they do not convert the case into a tort dispute and they will not support an award of punitive damages.[1]

18. Although, as stated above, undersigned counsel was not in attendance when this case was presented to the Arbitration Panel, it is my understanding that the case was tried the same way it is pled. That is, there was no evidence presented of separate tortious conduct by O'Quinn that caused separate actual damages in tort to Kline (*e.g.*, mental anguish damages, etc.) that could even function as the basis for an award of exemplary damages against O'Quinn. As stated above, it is my understanding that no discussion of exemplary damages occurred until after the evidence had been presented

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[1] In most situations where a plaintiff is suing on a contract and is also attempting to recover exemplary damages, the plaintiff at least pleads that he or she is seeking exemplary damages. This at least gives the defendant fair notice of the plaintiff's intentions. But here Kline not only failed to plead and prove separate actual damages in tort to support an award of exemplary damages -- but did even plead or pray for exemplary damages at all!

to the Arbitration Panel and then, only after the evidentiary portion of the proceeding was concluded, Kline submitted a *Post-Evidence/Pre-Summation Brief* arguing for exemplary damages. But there was no pleading or proof that complied with Texas law which could possibly support this late attempt to inject punitive damages into this Arbitration Proceeding.

Even if all other required elements had been pled and proven, Kline failed to plead and prove the type of intentional conduct necessary to support an award of punitive damages:

19. Assume for the moment that Kline had actually pled and proved separate actual damages in tort sustained as a result of breach of an alleged duty of good faith and fair dealing and/or an alleged fiduciary duty. Even this would not justify the award of punitive damages. A breach of the duty of good faith and fair dealing by itself does not entitle the injured party to punitive damages. A breach of a fiduciary duty by itself does not entitle the injured party to punitive damages. In order to recover exemplary damages for breach of the duty of good faith and fair dealing or breach of fiduciary duty, a complainant must also plead and prove and obtain the additional finding of fraud, malice, or gross negligence. *See Tex. Civ. Prac. and Rem. Code* §41.003; ***Burk Royalty Co. v. Walls***, 616 S.W.2d 911, 922 (Tex. 1981) (addressing the issue of exemplary damages in general); ***Arnold v. Nat. County Mutual Fire Ins. Co.***, 725 S.W.2d 165, 168 (Tex. 1987) (addressing the issue of exemplary damages in connection with claim of a breach of a duty of good faith and fair dealing); ***Manges v. Guerra***, 673 S.W.2d 180, 184 (Tex. 1984) (addressing the issue of exemplary damages in connection with a claim of breach of fiduciary duty). Here, Kline did not plead, *see PLAINTIFF'S ORIGINAL PETITION*, or prove this additional element which

is necessary to support an award of exemplary damages for breach of the alleged torts of good faith and fair dealing and/or fiduciary duty.

Summary with respect to Paragraph 2 of the AWARD:

20. Therefore, it is respectfully moved that this Court vacate Paragraph 2 of the AWARD and thus modify it on the grounds that, first, the arbitrators were not granted authority to award exemplary damages by the parties' arbitration agreement; second, Kline did not even plead or pray for exemplary damages from O'Quinn and only raised the issue for the first time in a brief filed after the evidentiary portion of the proceeding was concluded; third, as a matter of law Kline is not entitled to recover punitive damages from O'Quinn because she failed to plead and prove a separate tort that caused separate actual damages in tort, which is a legal requirement for an award of exemplary damages; and fourth, as a matter of law Kline is not entitled to recover punitive damages from O'Quinn because she failed to plead and prove the type of conduct on the part of O'Quinn in connection with separate tortious conduct (*i.e.*, separate from the alleged breach of contract) that is legally necessary to support an award of punitive damages, *i.e.*, fraud, malice, or gross negligence.

21. As mentioned above, the four reasons why the *AWARD* must be vacated and/or modified are interwoven. This Motion began with a discussion of the point that the Arbitration Panel exceeded its authority because it was not authorized by the written arbitration agreement to award punitive damages. The other three points discussed in this Motion bring the reasoning full circle. An award of punitive damages for breach of contract is so remarkably and fundamentally contrary to

Texas law that the parties -- all of whom are personal injury trial lawyers familiar with these legal principles -- could not and did not intend to grant the Arbitration Panel the authority to do so. Awarding punitive damages for alleged extra-contractual activities when the claimant did not comply, and could not comply, with the requirements of Texas law (*i.e.*, Kline failed to plead and prove a separate and distinct tort that caused separate and distinct actual damages and failed to plead and prove that such tortious conduct constitute fraud, malice, or gross negligence) is also so fundamentally contrary to Texas law that the parties could not and did not intend such result. Moreover, awarding punitive damages when the claimant did not even request such damages except as an after-thought violates due process and fundamental notions of fairness. Taken together, these points establish that allowing Paragraph 2 of the AWARD to stand not only exceeds the Arbitration Panel's authority but also constitutes a manifest disregard of the law. Such a disregard of the law constitutes a non-statutory ground for vacating the award. *See, e.g.*, ***American Postal Workers v. United States Postal Service***, 682 F.2d 1280, 1284 (9th Cir. 1982), *cert. denied*, 459 U.S. 1200 (1983).

THE AWARD ALSO FAILS TO PROVIDE O'QUINN RELIEF THAT WAS UNCONTROVERTED:

22. The *AWARD* contains an evident material miscalculation or mistake in the description of the monetary recovery due the parties. It is the understanding of undersigned counsel that the uncontroverted testimony presented with respect to the *Goings v. City of Houston* case established that Pearson recovered over $1.4 Million as a result of post litigation settlement. It is respectfully submitted that under the contract on which the Arbitration Panel based its award in Paragraphs 1, 3, 4, 5, and 6 of the *AWARD*, the Arbitration

Panel was presented uncontroverted evidence that Pearson agreed to pay, and should have paid, O'Quinn 25% of the attorneys fees Pearson received in the *Goings* case. It is undersigned counsel's understanding that Person admitted he collected and retained all of the attorneys' fees in the *Goings* case.

23. Therefore, O'Quinn respectfully requests that this Court modify the *AWARD* to award O'Quinn twenty-five (25%) of all funds recovered by Thomas J. Pearson as attorneys fees in the *Goings v. City of Houston* litigation.

WHEREFORE, PREMISES CONSIDERED, John M. O'Quinn respectfully requests that this Court vacate the June 23, 1992 *AWARD OF ARBITRATORS* in its entirety or, alternatively, that this Court (i) vacate Paragraph 2 of the *AWARD,* (ii) modify and correct the AWARD to award John M. O'Quinn twenty-five (25%) of all funds recovered by Thomas J. Pearson as attorneys fees in the *Goings v. City of Houston* litigation, and (iii) such other and further relief, both general and special, to which John M. O'Quinn may show himself justly entitled.

Respectfully submitted,

/s/ J. Clark Martin
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ATTORNEYS FOR
JOHN M. O'QUINN

CERTIFICATE OF SERVICE

I hereby certify that a copy of this O'QUINN'S MOTION TO PARTIALLY VACATE, OR ALTERNATIVELY MODIFY AND CORRECT ARBITRATION AWARD was served upon each of Donna C. Kline and Thomas J. Pearson by delivering copies to the United States Postal Service, certified mail, postage prepaid, addressed to their respective counsel of record as follows:

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Pro se

This 21st day of September, 1992.

/s/ Steven R. Borgman
Steven R. Borgman

Supreme Court, U.S.
FILED
MAY 24 1995
OFFICE OF THE CLERK

No. 94-1729

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOHN M. O'QUINN,

Petitioner,

v.

DONNA C. KLINE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS FOURTEENTH COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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13 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether Mr. O'Quinn may raise here now the questions he seeks to present:

a. in consideration of the absence of a complete record; or

b. in consideration of his having chosen to submit his post-Award complaints themselves to arbitration; or

c. in consideration of the waiver found by the court below.

2. Whether the Due Process Clause prohibits any award of punitive damages in any arbitration.

3. Whether, upon the record in this particular case, the Due Process Clause prohibits the award of punitive damages:

a. in consideration of the agreement between the parties; or

b. in consideration of the "pleadings" of Ms. Kline.

PARTIES TO THIS PROCEEDING

Petitioner is John M. O'Quinn, an attorney living and practicing law in the Houston, Texas area. He was a responding party in the arbitration below[1]; a defendant before the state trial court[2]; an appellee before the state intermediate appellate court[3]; and both a petitioner and a respondent before the highest state court[4].

Respondent is Donna C. Kline, also an attorney living and practicing law in the Houston, Texas area. She was the moving party in the arbitration[1]; the plaintiff in the trial court[2]; the appellant in the appellate court[3]; and both a petitioner and a respondent in the highest state court[4].

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[1] Case No. 70 194 0030 91 W before a Commercial Arbitration Tribunal of the American Arbitration Association, styled "In the Matter of the Arbitration between Donna C. Kline - and - John M. O'Quinn & Thomas J. Pearson." *See* Appendices G and H to Petition for Writ of Certiorari. (Respondent will employ the two-volume Appendix filed by Petitioner for Appendices A through P.)

[2] Cause No. 91-009787 in the 280th Judicial District Court of Harris County, Texas, styled "Donna C. Kline v. John M. O'Quinn, Thomas J. Pearson, and BankOne, N.A." *See* Appendix F.

[3] Case No. A14-93-00187 in the Texas Fourteenth Court of Appeals, styled "Donna C. Kline v. John M. O'Quinn, Thomas J. Pearson, and BankOne, N.A." *See* Appendices A, B and C.

[4] Case No. 94-0780 in the Supreme Court of Texas, styled "John M. O'Quinn v. Donna C. Kline." *See* Appendices D and E.

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OPINIONS AND JUDGMENTS BELOW

The "Opinions Below" section of the Petition tracks each decision below but takes one liberty. The Petition refers to the decision shown in Appendix H thereto as "The Arbitrators' *Denial of Petitioner's Motion to Partially Modify and Vacate Arbitration Award.*" No document bears that name. The decision shown at Appendix H refers to itself as an "Award of Arbitrator(s)." The distinction is not trivial.

One of the Petitioner's problems is that he chose to submit to the Arbitrators the same challenges to their first Award (shown at Appendix G) which he later presented in court. The Petitioner is now aggrieved by the second Award more than the first, yet he presents no constitutional or other challenge to it. Petitioner's creation of a new title for the second decision should not obscure this infirmity.

OBJECTION TO JURISDICTION

The writ of certiorari in this case is sought against the decision of the Texas Fourteenth Court of Appeals. *See* Appendix A. That court dealt with Mr. O'Quinn's due process arguments without reaching their merits. It correctly held that Mr. O'Quinn did not raise any due process argument (except lack of notice) before the trial court. *See* Appendix A, p. A-12. Mr. O'Quinn feebly addresses this point at pages 24-27 of his Petition.

In his first argument (at Petition, pages 25-26) he tries to convince this Court that the Texas court incorrectly applied Texas rules regarding preservation of error, a point this Court should not reach in the absence of an argument that Texas procedure for preserving error is itself unconstitutional.

His second argument (at Petition, pages 26-27) contends that his due process points were all set out below. The Petition understandably neglects to quote the passages which it argues salvage the points. Respondent invites this Court to search the passages cited by Petitioner (paragraph 9 of Appendix O and paragraphs 10-13 and 21 of Appendix P) for any such due process point. They are not there.

The waiver occurring below has jurisdictional implications here now. *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975).

STATEMENT OF THE CASE

Respondent perceives material misstatements of fact within Petitioner's Statement of the Case and within the Petition generally. Respondent offers these corrections:

The Petitioner's Statement of the Case opens with a stunningly misleading statement when it says, "This dispute arises out [sic] the arbitration of a contract dispute among lawyers over the allocation of contingent fees from various lawsuits or cases." (emphasis in original) The case below, both in arbitration and in court, was never limited to "contract" disputes. It always involved breach of trust. The agreement between these parties expressly required that any moneys recovered would be held by Mr. O'Quinn in trust for accounting and distribution. The money was in fact received by Mr. O'Quinn into a trust account. Ms. Kline steadfastly complained of the violation of the trust duties thus accepted by Mr. O'Quinn.

Ms. Kline's pleadings always sought "such other and further relief, whether at law or in equity, whether general or special, to which she may show herself entitled" and always prayed for "general relief." This was never just a contract case against Mr. O'Quinn. It was never a case in which Ms. Kline "did not seek punitive damages," as asserted in the second sentence of the Petitioner's Statement of the case. We note that there is no complaint in the Petition before this Court to the effect that the procedures of the American Arbitration Association or the Texas courts deny parties a right to flesh out their opponents' general pleadings.

This is a case in which Mr. O'Quinn received into trust (a fiduciary relationship) millions of dollars. The root problem was not the "allocation" of the money, as euphemistically suggested in the first sentence of Petitioner's Statement of the Case. The root problem was that Mr. O'Quinn, the trustee, paid out to himself individually **all** of Ms. Kline's share of the recoveries. Her "allocation" by Mr. O'Quinn was zero. He breached his trust, as the arbitrators manifestly concluded based on the record before them.

REASONS FOR DENYING THE PETITION

Logically, all of Petitioner's arguments can be divided into two groups: one argument which would not depend upon a review of the full record in this particular case and other arguments which would.

I. THE DUE PROCESS CLAUSE DOES NOT BAR ALL ARBITRATION AWARDS OF PUNITIVE DAMAGES IN ALL CASES.

Part I of the Petition (at pages 9-16) argues that no award of punitive damages in an arbitration can ever survive a challenge under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Of course, no prior decision of this or any other court says any such thing. The Petition wistfully suggests (at page 15) that perhaps no one previously thought to raise such an argument. If that is true, it is understandable.

Whatever standards of review are required for punitive damage awards can just as easily be applied to an arbitration proceeding as to a jury trial (assuming the complaining party bothers to have a record made of the proceeding).

Unlike *Honda Motor Co. v. Oberg*, 114 S.Ct. 2331 (1994), this case does not present a state statute or rule of decision which prohibits judicial review of the amount of a punitive award. Unlike *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), this case does not involve the validity of legal instructions for restraining lay jury awards. Unlike *TXO Production Corp. v. Alliance Resources Corp.*, 113 S.Ct. 2711 (1993), this case does not raise any issue of excessive magnitude of a punitive award. What petitioner seeks to raise is an issue of how judicial review of an arbitration award can be exercised so as to ensure Due Process compliance.

Assuming *arguendo* that such review is necessary[5], it can be performed the same way it is in a jury case. This begins by reviewing the complete record of the challenged proceeding. Of course, that cannot be done in this particular proceeding because neither Mr. O'Quinn nor anyone else saw fit to have a record made. *Cf.* Appendix A, p. A-11. But that does not mean that all punitive damage awards in all arbitrations must be set aside.

Under Texas law, when a party agrees to arbitrate all of her "disputes" or "controversies" arising out of business dealings, this includes claims for punitive damages. *USX Corp. v. West*, 781 S.W.2d 453, 455 (Tex. App.--Houston [1st Dist.] 1989, *orig. proceeding*). The parties to this case contracted with reference to Texas law, as the Petition concedes.

This case, accordingly, does not fairly present the difficult question implied in Petitioner's leading argument. That question, restated, is: When a party with a punitive damage claim has agreed to arbitration, must there be two trials -- one in the arbitration on everything but the punitive damage claim and one in court on just the punitive damage claim?

If, under the Due Process Clause, no arbitration award of punitive damages can even be affirmed, this Court need not have bothered deciding *Mastrobuono v. Shearson Lehman Hutton*, 115 S.Ct. 1212 (1995), as it did. The contractual analysis that case gives to the contracting parties'

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[5] The Arbitrators in this case were all experienced civil trial lawyers.

intent regarding punitive damages could have been avoided altogether if this Petitioner is right. Applying the pro-arbitration policy of the Federal Arbitration Act to a case of punitive damages would lose all meaning if the Act is unconstitutional in this regard.

That punitive damages should be assessed by arbitrators instead of jurors is not fundamentally at odds with the Due Process Clause.

II. IN THE ABSENCE OF A COMPLETE RECORD, THIS CASE CANNOT BE FAIRLY DECIDED ON PETITIONER'S OTHER POINTS.

In Texas, the courts say:

> We should not say to defaulting fiduciaries that the most for which they can be held accountable in equity are the profits which would have remained theirs had they not been called into account.

International Bankers Life Ins. Co. v. Holloway, 368 S.W.2d 567, 584 (Tex. 1963). The Petitioner here nonetheless submits that he should not be subject to punitive damages in this particular case because:

A. The arbitration agreement between these parties did not expressly refer to punitive damages. (*See* part II of Petition at pp. 16-20); or

B. Mr. O'Quinn had no notice that he was at risk of a punitive damage award in the arbitration (*see* part III of the Petition at pp. 20-23).

These very issues were submissible to the arbitrators after their Award. *See* Appendix H, the Second Award of Arbitrator(s) denying Mr. O'Quinn's post-Award motion. The Petitioner does not even claim that there is a constitutional defect undermining the disposition by the arbitrators of the challenges Mr. O'Quinn chose to present to them first.

When the Petition says that "[i]t appears" that something happened in the arbitration (*see* Petition, p.22). The Court should be alert to what is missing -- record references. The Texas Fourteenth Court of Appeals was well aware of the difficulties this presented, for it repeatedly noted in its opinion the lack of a record of the arbitration filings and evidence. *See* Appendix A, pp. A-7, A-9, A-11. The appellate court's opinion defers to the arbitrator's decision not just because Texas law calls for them to do so[6], but also because they had no choice in the absence of a record. This Court is in no better position, for the record has not suddenly materialized.

Respondent could, if she chose, disagree here with the Petitioner's assertions regarding when punitive damages were first specifically made an issue in the arbitration; or whether discovery in the arbitration was "abbreviated;" or whether the rules of evidence were "relaxed' in this particular arbitration. Yet this Court will have no way ever of knowing.

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[6] *Riha v. Smulcer*, 843 S.W.2d 289, 293-94 (Tex.App. -- Houston [14th Dist.] 1992, *no writ*); *Bailey v. Williams*, 727 S.W.2d 86, 90 (Tex.App. -- Dallas 1984, *writ ref'd, n.r.e.*).

This makes this particular case a poor vehicle for reaching constitutional questions of the sort raised in the Petition.

CONCLUSION

The Petition for Writ of Certiorari of John M. O'Quinn should be denied.

Respectfully submitted,

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